Supreme Court of the United States

OCTOBER TERM 1920.

No. 25 ORIGINAL.

IN THE MATTER

OF

THE PETITION OF THE STATE OF NEW YORK, THE PEOPLE OF THE STATE OF NEW YORK, EDWARD S. WALSH, SUPERINTENDENT OF PUBLIC WORKS OF THE STATE OF NEW YORK AND EDWARD S. WALSH, INDIVIDUALLY AND PERSONALLY, FOR A WRIT OF PROHIBITION AND/ OR A WRIT OF MANDAMUS,

AGAINST

HON. JOHN R. HAZEL, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES WITHIN AND FOR THE WESTERN DISTRICT OF NEW YORK, AND THE OFFICERS OF SAID COURT.

BRIEF IN OPPOSITION TO THE PETITION.

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United States District Judge,
Western District of New York.

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Of Counsel.

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BRIEF IN OPPOSITION TO THE PETITION.

Statement of the Case.

Libellants, acting either as bailees or owners, filed three separate libels *in rem* in the United States District Court within and for the Western District of New

York. One libel was filed against the Steam Tug "*Henry Koerber, Jr.*", her boilers, engines, tackle, apparel and furniture, on the fifteenth day of April, 1920, by Murray Transportation Company, Bailee of United States Navy Coal Barge No. 483, in a cause of collision, to recover for damages alleged to have been received by said coal barge while being navigated on the Erie Canal in tow of the Tug "*Henry Koerber, Jr.*". The two remaining libels were filed against the Steam Tug "*Charlotte*", her engines, boilers, machinery, boats, tackle, apparel and furniture, on the fifth day of February, 1920, by George Wagner and William J. Dolloff respectively, in causes of collision, to severally recover for damages alleged to have been received by canalboats owned by the respective libellants while being navigated on the Erie Canal in tow of the Tug "*Charlotte.*"

The prayer of each of said libels sought the issuance of process for the *seizure* and *arrest* of the respective tugs "*Henry Koerber, Jr.*", and "*Charlotte*". Process was issued thereon in the usual course and was duly served in the cause against the "*Henry Koerber, Jr.*". A satisfactory stipulation for release from arrest of the "*Henry Koerber, Jr.*", and like stipulations in lieu of arrest of the "*Charlotte*", together with verified *claims* to the *res* in each case, were then filed in said District Court by Frank F. Fix and Charles Fix doing business under the name and Style of Fix Brothers, of Buffalo, New York, *as claimants* thereto, and the vessels were thereupon released by the Marshal.

On June 8, 1920, said claimants filed their answer in the cause against the "*Henry Koerber, Jr.*", and on

June 12, 1920, they likewise filed their answers in the respective causes against the "*Charlotte*". At the same time claimants of the respective tugs likewise filed with the District Court their respective verified petitions, in each case, under Rule Fifty-nine (59) of the Admiralty Rules of Practice For The Courts of the United States, together with their respective stipulations for costs conformably to the said Rule. The several petitions contain allegations that, in each cause, at the time of the respective disasters and damage complained of, the Steam Tugs, "*Henry Koerber, Jr.*", and "*Charlotte*" were under charter by the owners, said claimants, to Edward S. Walsh, Superintendent of Public Works of the State of New York, who had entered into such charter parties under authority reposed in him by virtue of an Act of Legislature of the State of New York; and that, at the time of the respective disasters complained of, said respective Steam Tugs "*Henry Koerber, Jr.*" and "*Charlotte*" were, by virtue of said charters, solely under the operation, control, direction and management of said Superintendent of Public Works. The facts of the respective actions *in rem* were therein recited and it was further alleged that if decrees should be found and ordered in the respective causes against the "*Henry Koerber, Jr.*" and "*Charlotte*", then petitioners, for the faults alleged in the libels, by virtue of their ownership of said vessels, would become liable for the payment of the same and would be mulcted in damages for the disasters, to which they were total strangers and concerning which they had no control, direction or participation; and that by reason of the facts as alleged, Ed-

ward S. Walsh, Superintendent of Public Works of the State of New York, ought to be proceeded against in the same suits for such damage, in accordance with the provisions of Rule Fifty-nine (59) of the Admiralty Rules. It was also therein alleged that in the event of the ordering of decrees against said *vessels* for the damages complained of, that *petitioners would be unable, by operation of law, to recoup their loss thereon* by appropriate action against the Superintendent of Public Works or the People of the State of New York and that petitioners would be compelled thereby to sustain a considerable pecuniary loss for damages, for which they were in no way liable, and toward which they did not contribute by any act or omission whatsoever.

The petitions contain further allegations as to the existence of property used and controlled by the Superintendent of Public Works located within the Western District of New York. Appropriate prayer for the issuance of process was added thereto. Upon each petition Hon. John R. Hazel, United States District Judge in and for the Western District of New York, made and entered formal orders in the respective causes directing that process conformably to the course and practice in cases of admiralty and maritime jurisdiction and as provided by Admiralty Rule Fifty-nine (59), issue against Edward S. Walsh, Superintendent of Public Works of the State of New York, and in case he cannot be found then that the goods and chattels of the State of New York used and controlled by him be attached to the amount sued for. Such process citing said Superintendent of Public Works to appear

and answer was duly issued in the respective actions and was *duly served upon Edward S. Walsh personally* by the United States Marshal *within the Western District of New York* on the 19th day of July, 1920.

Upon the adjourned return day, September 7, 1920, upon the call of the calendar in open court, Hon. Chas. D. Newton, Attorney General of the State of New York, by Edward G. Griffin, Deputy Attorney General, appeared before the court and *orally* entered his special appearance as proctor on behalf of the State of New York, the People of the State of New York, the Superintendent of Public Works of the State of New York, and Edward S. Walsh, and *orally* moved the District Court for an order withdrawing the monitions theretofore issued and dismissing the proceedings under Rule Fifty-nine (59) as against the Superintendent of Public Works, upon the ground that the District Court was without jurisdiction of the person or the subject matter so far as the Superintendent of Public Works of the State of New York was concerned. Objection thereto was orally made by proctors for petitioners and argument was heard thereon by the District Judge. Briefs on the law were submitted and on September 25, 1920, the written decision of the District Court was filed denying in all things the motion of the Attorney General of the State of New York. Subsequently and on October 8th, 1920, an order was entered, conformably to such decision, denying the motion of the Attorney General in all things, with costs, upon the ground stated in the opinion. On the same day the Attorney General procured an order from the District Court permitting a written *suggestion* of *want*

of jurisdiction made by the Attorney General to be filed *nunc pro tunc* as of September 7th, 1920. This suggestion is upon the ground that the joinder of Edward S. Walsh, Superintendent of Public Works of the State of New York, as a party respondent therein, constitutes suits, cases, controversies and causes against the State of New York, in which the State of New York has not consented to be sued here or in any other place; that the District Court is therefore without jurisdiction of the subject matter set up in the foregoing petitions, orders or monitions directly or by reference or of the person of Edward S. Walsh, Superintendent of Public Works of the State of New York.

Further action thereon was suspended by stipulation of proctors pending the result of the proceedings herein taken by petition to this court for writ of prohibition and/or mandamus.

Statement of Facts.

A. LEGISLATION.

The Legislature of the State of New York by the provisions of Chapter 264 of the Laws of 1919 of the State of New York enacted to be immediately effective "An Act to authorize the Superintendent of Public Works to provide towing facilities on the State Canals, and making an appropriation therefor," which Act is as follows:

> "The People of the State of New York, represented in Senate and Assembly, do enact as follows: Section 1. The Superintendent of Public Works is hereby authorized to provide such facili-

ties as in his judgment may be necessary for the towing of boats on the canals of the state. Such towing service shall be furnished by the Superintendent of Public Works under such rules and regulations as he shall adopt, and he is hereby authorized and empowered to impose and collect for such towing service such fees as in his judgment may seem fair and reasonable, and will foster and encourage the use of the state canals for the transportation of freight. The tables of distances on file in the office of the Superintendent of Public Works shall be conclusive in computing distances on the canals. The moneys so collected shall be deposited in the state treasury by the Superintendent of Public Works, pursuant to the provisions of the State Finance Law.

2. For the purpose of carrying into effect the provisions of this act, the sum of two hundred thousand dollars ($200,000), or so much thereof as may be necessary, is hereby appropriated out of any moneys in the treasury not otherwise appropriated, payable to the order of the Superintendent of Public Works by the treasurer, on the warrant of the Comptroller.

3. This act shall take effect immediately."

The above legislation was in full force and effect at the time the charters of the tugs were entered into by the Superintendent of Public Works, and at the time of the disasters complained of.

It was further enacted in Section 37 of the original Canal Law of 1894 of the State of New York, now Sec-

tion 47 of the Canal Law (Chapter 13, Laws 1909) as follows:

"47. Claims for damages.—There shall be allowed and paid to every person sustaining damages from the canals or from their use or management, or resulting or arising from the neglect or conduct of any officer of the state having charge thereof, or resulting or arising from any accident, or other matter or thing connected with the canals, the amount of such damages to be ascertained and determined by the proper action or proceedings before the Court of Claims; but no judgment shall be awarded by such court for any such damages in any case unless the facts proved therein make out a case which would create a legal liability against the state, were the same established in evidence in a Court of Justice against an individual or corporation; but the Superintendent of Public Works may make settlement of any such claim in any case where the amount thereof does not exceed the sum of five hundred dollars, but no such settlement shall be effective against the state until same has been approved by the attorney-general and the canal board; provided that the provisions of this section shall not extend to claims arising from damages resulting from the navigation of the canals.

Neither the Comptroller nor the commissioner of the canal fund shall pay any damages awarded, or the amount of any commutations agreed on for the appropriation of land or water, or for the

erection of a farm bridge, until a satisfactory abstract of title and certificate of search as to incumbrances is furnished, showing the person demanding such damages or commutations to be legally entitled thereto, which abstract and search shall be filed in the office of the Comptroller."

It will be observed that by virtue of such enactment the Court of Claims is specifically prohibited from consideration and determination of claims arising from damages resulting from the navigation of the canals.

B. STATUS OF THE STEAM TUGS "HENRY KOERBER, JR." AND "CHARLOTTE."

Following the enactment of Chapter 264 of the Laws of 1919 referred to, and on May 16, 1919, the People of the State of New York, through Edward S. Walsh, Superintendent of Public Works, entered into two written charter parties with Fix Brothers of Buffalo, New York, claimants herein, as owners of the Steam Tug boats *"Henry Koerber, Jr."* and *"Charlotte"* respectively. The charter parties provided that the owners chartered and let said vessels respectively to the Superintendent of Public Works from May 15, 1919, to such date between November 15, 1919 and December 15, 1919, as might be determined by the Superintendent, for which said charter and use the Superintendent agreed to pay the owners the sum of Twenty ($20.00) Dollars per day, together with all moneys actually and necessarily paid by the owners as wages to the crews manning said tugs; that said charter parties provided that the Superintendent should operate said vessels in such manner in such waters as he should

direct; that the crews employed on said tugs should be acceptable to the Superintendent and subject to immediate dismissal either by the owners upon the Superintendent's direction or by the Superintendent direct if he so elected; and that the Superintendent would furnish all fuel and supplies necessary for the operation of said tugs. The sole duty remaining upon the owners was that of maintaining the tugs and their machinery in proper and seaworthy condition. The tugs were immediately delivered over to the Superintendent of Public Works, and thereafter were engaged by him in towage of vessels upon the Erie Canal under the terms of the charter parties and were so engaged at the time of the disasters complained of.

That it is alleged in the libel against the "*Henry Koerber, Jr.*" that the "*Henry Koerber, Jr.*" in the month of October, 1919, was proceeding easterly along the Erie Canal towing United States Navy Coal Barge No. 483, in company with another barge, when the bow of Barge No. 483 came into contact with the south canal wall or bank at a point between Lock No. 4 and Lock No. 3, resulting in damage to the Barge No. 483, amounting to approximately Three Thousand ($3,000.00) Dollars, for which amount libellant claims the right to recover.

That it is alleged in the libels against the "*Char-*"*iotte*", that the "*Charlotte*" on the 7th day of July, 1919, was proceeding westerly along the Erie Canal towing five canalboats, among them the "John Monk", the property of libellant George Wagner, and the "Joseph Weed" and "Romayne", the property of libellant William J. Dolloff, when the "Joseph Weed"

came into contact with the canal wall or abutment adjacent to the Indian Castle guard lock, resulting in damage to the boat "John Monk" in the sum of Nine-Hundred Ninety-five ($995.00) Dollars, and to the boats "Joseph Weed" and "Romayne" in the sum of Eighteen Hundred Sixty-six and 32/100 ($1866.32) Dollars, for which amounts libellants respectively claim the right to recover.

Brief of the Argument.

I. These causes are not proper subjects for the issuance of writs of prohibition and/or mandamus

II. The District Court possesses complete exclusive jurisdiction.

III. The Superintendent of Public Works of the State of New York is subject to the exercise of admiralty jurisdiction.

IV. Courts of Admiralty do not countenance depriving litigants of their proper remedy.

ARGUMENT.

I. These causes are not proper subjects for the issuance of writs of prohibition and/or mandamus.

The power vested in the United States Supreme Court to grant writs of prohibition and/or mandamus herein is established by Section 234 of the Judicial Code, Revised Statutes Section 688, which provides:

> "The Supreme Court shall have power to issue writs of prohibition to the district courts when

proceeding as Courts of Admiralty and Maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States where a State, or an ambassador, or other public minister, or a consul, or vice-consul is a party."

1. THIS COURT HAS NOT GRANTED WRITS OF PROHIBITION WHEN PETITIONER POSSESSED ANOTHER REMEDY.

In commenting on Section 688, this court said with reference to the writ of prohibition provided therein, In *Re Ex Parte* Cooper, 143 U. S. 472:

> "The writ thus provided for by Section 688 is the common law writ, which lies to a Court of Admiralty only when that court is acting in excess of, or is taking cognizance of matters not rising within its jurisdiction."

To the same effect also, See *Ex Parte* Frederick Gordan, 104 U. S. 515.

In the case of *Ex Parte* New York & Porto Rico Steamship Co., 155 U. S. 523, where the precise question as to the right of the District Court to take and maintain jurisdiction of a charterer under Rule Fifty-nine (59), was presented for decision, being thus identical with the causes at bar, it was said in part in denying the writ (P. 531):

> "In this instance, the District Court saw fit to adopt the practice, which would have obtained in

equity, of bringing all the parties in and trying the whole matter at once, and we are asked to prohibit that court from so proceeding on the ground of want of jurisdiction thus to implead the charterers.

We have recently thus stated the principles applicable to the issue of the writ of prohibition, In Re Rice ante, p. 396: "Where it appears that the court, whose action is sought to be prohibited, has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings. Smith v. Whitney, 116 U. S. 167, 173. *Ex Parte* Cooper, 143 U. S. 472, 495."

So in these causes, without reviewing the action of the District Court on its merits, it certainly cannot be said that that court was clearly without jurisdiction, or that petitioner was without other remedy, for in the event of a decree against him, he could appeal directly to this court on the question of jurisdiction, or

to the Circuit Court of Appeals upon the whole case, which court might then certify such question to this court for decision. See Morrison vs. District Court of the United States, 147 U. S. 14, 26; United States v. Jahn, 155 U. S. 109, 115.

We urge that these cases at bar are far from being cases in which it should be regarded as a proper exercise of discretion to interfere with the orderly progress of the suit below by means of the issuance of this writ. Rather, the District Court, having general jurisdiction over the subject matter and over the parties, should be allowed to proceed to decision upon the merits, and if error has been or shall be committed in entertaining the claimants' contention against the charterer in the same suit with the libel against the ship, it may be later corrected on appeal. See *Ex Parte* Fassett, 142 U. S. 479, 484; Moran v. Sturges, 154 U. S. 256, 286.

In *Ex Parte* Frederick Gordon, *supra*, it was held that, in a suit for damages for certain loss of life resulting from a vessel collision, the collision was certainly a subject of admiralty jurisdiction as likewise was the vessel, and that the District Court was competent to hear and decide the damages incurred, and that an appeal would lie from its decision. The writ was therefore denied.

In *Ex Parte* Detroit River Ferry Company, 104 U. S. 519, the foregoing decision was followed upon similar facts, and the writ denied, as was likewise the result in *Ex Parte* Walter F. Hager, 104 U. S. 520.

In non-admiralty causes where the writ of prohibition has been sought as a creature of the common law,

similar decisions have been reached and the doctrine as laid down in In *Re* Rice, 155 U. S. 396, reaffirmed.

We refer to the statements contained in the following opinions: In *Re* Huguley Manufacturing Company, *et al.*, 184 U. S. 297; Alexander v. Crollott, 199 U. S. 580; In *Re Ex Parte* Oklahoma, 220 U. S. 191. The opinion in the latter case, pages 208, 209, is particularly conclusive on the point.

Claimants therefore urge that the application for writs of prohibition in the causes at bar is not proper, and, in accordance with the prior decisions of this court, should not be granted for the reason that, having properly exercised its admiralty powers by means of its process duly issued and served conformably to the statute and the Admiralty Rules, and having general jurisdiction of the subject matter and the vessels, the District Court should be allowed to proceed to decision without interference; and if error be committed by it upon a hearing upon the merits, that there still remains in the petitioner the right of correction of the same by appeal.

United States v. Jahn, supra, page 115.
In Re Ex Parte Oklahoma, supra, pages 208, 209.

2. THIS COURT HAS NOT GRANTED WRITS OF MANDAMUS WHERE PETITIONER HAD OTHER REMEDY.

We direct attention to the language used by this court in its opinion denying a petition for a writ of

prohibition filed by the State of Oklahoma. *In Re Ex Parte* Oklahoma, 220 U. S. 191, 209.

> "In view of the identity of the principles which govern the right to invoke the extraordinary remedy of mandamus to correct an unlawful assumption of jurisdiction, and those which control the power to issue the writ of prohibition for the same purpose, it was perhaps unnecessary to consider the subject from an original point of view, since the matter is settled by authority. Quite recently in *re* Harding, 219 U. S. 363, the whole subject was reviewed, and it was held that discretion to issue the writ of mandamus would not be exerted to review a question of jurisdiction where there was otherwise adequate remedy provided by statute for the review of errors in that respect, asserted to have been committed by a Trial Court."

In *Re* Harding, *supra*, at page 369, the following was said:

> "The doctrine that a court which has general jurisdiction over the subject matter and the parties to a cause is competent to decide questions arising as to its jurisdiction, and therefore that such decisions are not open to collateral attack, has been so often expounded. (See Dowell v. Applegate, 152 U. S. 327, 337 and cases cited) and has been so recently applied (United States use of Hine v. Morse, 218 U. S. 493) that it may be taken as elementary and requiring no further reference to authority."

The decree here is interlocutory only and is not a final decree. A writ of error may not be had for the purpose of reviewing a decree, which is purely interlocutory. It has been held by this court in several different cases that mandamus cannot be used as a writ of error.

Morrison v. District Court of United States, 147 U. S. 14, 26.
Ex Parte Des Moines & M. R. Co., 103 U. S. 794, 796.
Ex Parte B. & O. R. Co., 108 U. S. 566.
Re Pennsylvania Co., 137 U. S. 451, 453.
In Re Rice, 155 U. S. 396, 403.
Ex Parte Union Steamboat Co., 178 U. S. 317, 319.
Re Atlantic City Railroad Co., 164 U. S. 633, 634.
Re Huguley Mfg. Co., 184 U. S. 297, 301.
Am. Construction Co. v. Jacksonville T. & K. W. R. Co., 148 U. S. 372, 379.
Re Pollitz, 206 U. S. 323, 331.

Furthermore it has been held, as also in cases of petitions for writs of prohibition, that mandamus is never granted where the party asking it has another remedy.

Morrison v. District Court of the United States, Supra.
Re Pennsylvania Co., Supra.
Ex Parte Union Steamboat Co., Supra.
Re Atlantic City Railroad Co., Supra.
Re Huguley Mfg. Co., Supra.

As has been pointed out in the preceding point rela
tive to the power to issue writs of prohibition, in th
event of the rendition of a final decree upon the merit
against the petitioner, he is not without other and ade
quate remedy, for he could then appeal, either directly
to this court, or upon the whole case, to the Circui
Court of Appeals. See Morrison v. District Court o
United States, *supra;* United States v. Jahn, 155 U
S. 109, 115; In *Re Ex Parte* Oklahoma, *supra.*

Moreover, the plain effect of these applications is
to seek to direct the District Court for the Western
District of New York to decide this question in a par
ticular way, and such has been distinctly said was not
the office of the writ of mandamus. See Morrison v
District Court of United States, *supra;* citing *Ex Parte*
Morgan, 114 U. S. 174, *Ex Parte* Brown, 116 U. S. 401
also In *Re* Rice, *supra; Re* Pollitz, *supra.*

It is urged therefore that the application for writs
of mandamus in the causes at bar is not proper, and
should not be granted under the authority of the prior
decisions of this court.

3. QUESTIONS OF JURISDICTION HERE
SHOULD NOT BE RAISED BY EXCEPTIONS TO
THE LIBEL OR PLEA ON THE MERITS.

The basic contention of the Attorney General of the
State of New York, as disclosed by the suggestion and
brief filed, and oral argument made, in the court below,
is that the District Court is without jurisdiction be-
cause these causes constitute actions brought against
the State of New York in which the State of New York
has not consented to be sued. Upon that contention, it

follows as of course, *that the precise inquiry becomes that of whether or not these causes constitute actions against the State of New York.*

That such question is one which belongs to the merits rather than to the jurisdiction, and is more properly the subject of demurrer or plea rather than of a motion to dismiss was flatly held by this court in Scully v. Bird, 209 U. S. 481, in which its prior decision of Illinois Central Railroad Co. v. Adams, 180 U. S. 28, was reaffirmed and the language of Chief Justice Marshall in Osborn v. Bank of United States, 9 Wheat, 738, 856, in connection therewith again cited with approval. In both Scully v. Bird, and Illinois Central Railroad Co. v. Adams, the precise ground for the dismissal of the bill in the court below was want of jurisdiction upon the ground that the suit was in effect a suit against a state, the party named as defendant in each cause being a state officer.

So here the benefits of Rule Fifty-nine are properly sought by the claimants against the individual who, as Superintendent of Public Works chartered their craft and exercised dominion over them at the time of the disasters complained of. It is therefore urged under the rule of the foregoing cases, that the important question raised by the Superintendent of Public Works, viz: that these causes constitute suits against the State of New York, is one, *not of jurisdiction*, but rather whether in the exercise of its jurisdiction, the District Court ought to make a decree against him who is brought in by the application of the Fifty-ninth Rule, and that such question should therefore be raised either by exceptions to the libel or plea on the merits.

and not made the subject of a motion to dismiss the proceedings upon a special appearance for that purpose alone. We shall show that the District Court has complete jurisdiction so that petitioners' question becomes one properly for the merits.

4. THE SUGGESTIONS FILED BY THE ATTORNEY GENERAL OF NEW YORK ARE NOT COMPETENT EVIDENCE.

It was long since laid down as the rule that he who claimed exemption from the ordinary process of the court carried the burden of proof to sustain his defense by competent evidence.

Long vs. The Tampico, 16 Fed. Rep. 491.

It is freely conceded that the principle has obtained in the case of a friendly foreign sovereign to accord respect to a suggestion of immunity made by the accredited representative of such sovereign and to recognize the facts therein stated as to the status of a vessel belonging to such sovereign as being conclusive.

Tucker vs. Alexandroff, 183 U. S. 424, 441.

This practice has obtained because the matters contained in such suggestion would not be justiciable by our courts, and the admission of such suggestion as proof is a matter of courtesy (Hall, International Law, 6 Ed. p. 161).

This principle does not, however, obtain in cases of vessels belonging to the United States proceeded against in our own courts, and suggestions of immunity in such cases will be disregarded unless they are

assented to or supported by the customary legal evidence, such matters being justiciable by our courts.

In *South Carolina v. Wesley,* 155 U. S. 542, where the Attorney General of South Carolina filed a suggestion as to the title of certain lands involved in the action, this court said:

> "In addition, the record does not show that the averments of the suggestion were either proved or admitted, and it certainly cannot be contended that the Circuit Court ought to have arrested proceedings on a mere suggestion. U. S. v. Peters, 5 Cranch, 115; The Exchange v. McFaddon, 7 Cranch, 116; Osborn v. Bank of United States, 9 Wheat, 738; United States vs. Lee, 106 U. S. 196; Stanley v. Schwalby, 147 U. S. 508."

Here the Attorney General has wholly failed to furnish legal proof of any description concerning the allegations contained in his suggestions, and boldly demands the most stringent and drastic relief without in any manner giving proof as to the necessity or propriety thereof. The facts stated by proctors at the hearing before the District Court, as to the issue later presented in the form of the written suggestion, were stated and traversed orally and informally by proctors for both parties merely for the benefit of the court upon such hearing. No proof of any kind was adduced. It is urged therefore that writs should not be granted upon the mere suggestion as filed.

II. The District Court possesses complete exclusive jurisdiction of these causes.

1. THE JUDICIAL POWER OF THE UNITED STATES EXTENDS TO ALL CASES OF ADMIRALTY AND MARITIME JURISDICTION.

The fundamental law of the land establishes, that the judicial power of the United States of America extends, among other specific provisions therein, "to all cases of admiralty and maritime jurisdiction."

Constitution, Article 3, Section 2.

That the whole jurisdiction of the admiralty rests directly upon such grant has been too often set down as the basis for decisions by this court to require further citation here.

2. CASES OF ADMIRALTY AND MARITIME JURISDICTION HAVE BEEN COMMITTED TO THE ORIGINAL AND EXCLUSIVE JURISDICTION OF THE DISTRICT COURT.

Congress acting in accordance with the provisions of the Constitution not only provided that the District Courts shall have original jurisdiction of all civil causes of admiralty and maritime jurisdiction (Revised Statutes, Section 563, Judicial Code, Section 24, (3)) but has further enacted in Revised Statutes, Section 711, Judicial Code Section 256 as follows:

"The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states.

* * * * * * * * * *

Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."

This provision granting exclusive jurisdiction has been many times construed and discussed and has been uniformly recognized by this court. Interesting discussions of the various applications of the statute with relation to the maintenance of the exclusive character are to be found in the opinions in The Moses Taylor, 4 Wall, 411; The Ad Hine v. Trevor, 4 Wall 555; The Belfast, 7 Wall, 624. The Glide, 167 U. S. 606.

It should be said in this consideration, that the clause contained in the Statute saving the right of a common law remedy, where the common law is competent to give it, is not to be considered or applied here in any capacity whatever, as these are causes, by their very nature, pure actions *in rem* and are, as such, *sui generis*, distinctly admiralty remedies, not known to the common law. See Benedicts Admiralty, 4th Ed. Sec. 128.

3. CAUSES OF COLLISION ARISING UPON NAVIGABLE WATERS CREATE MARITIME LIENS WHICH ARE SUBJECTS OF ADMIRALTY JURISDICTION.

It has been several times held by this court following the decision in the English case of The Bold Buccleugh, 7 Moore P. C. C. 267, that a claim for damages by collision between two ships creates a maritime lien, as soon as the claim comes into being *a jus in re,* to be afterward enforced in admiralty by process *in rem.*

The John G. Stevens, 170 U. S. 113, 117 and cases there cited.

It was decided in The Belfast, 7 Wall, 624, that locality is the true test of admiralty cognizance in all cases of marine torts, and if it appears, as in cases of collision, that the wrongful act was committed on navigable waters within the admiralty and maritime jurisdiction of the United States, then the case is one properly cognizable in the admiralty.

The John G. Stevens, *supra,* at page 125, also refers with approval to the decisions of this court holding that suits by the owner of a tow against her tug to recover for an injury to the tow by negligence on the part of the tug are suits *ex delicto* and bear essential likeness to ordinary collision causes.

Concededly, the waters of the Erie Canal upon which the damages complained of occurred are public navigable waters of the United States.

The Robert W. Parsons, 191 U. S. 17.

It is contended therefore that the causes at bar, being denominated in the respective libels as causes of collision, civil and maritime, and being causes in which without question the remedy sought is sought against the *res* for maritime torts which created a *jus in re,* are distinctly subjects of the admiralty jurisdiction, and,

as such, within the complete original and exclusive jurisdiction of the District Court in causes of admiralty and maritime jurisdiction.

III. The Superintendent of Public Works of the State of New York is subject to the exercise of admiralty jurisdiction.

The District Court unquestionably has control of the *res*, as the "*Henry Koerber, Jr.*" and the "*Charlotte*" were within the territorial jurisdiction of the court when arrested upon its process. They were subject to maritime liens in favor of the respective libellants. Likewise the Superintendent of Public Works of the State of New York, was within the territorial jurisdiction of the court when its process, issued conformably to Rule Fifty-nine (59), was served personally upon him at Buffalo, New York. Moreover, it was alleged in the petitions filed by claimants that the Superintendent of Public Works had and maintained various property under his control and direction within the Western District of New York. Therefore the only question remaining to be determined is, whether, having such control of the subject matter, vessels and parties by due and proper exercise of its admiralty process, the District Court might also exercise its admiralty jurisdiction against the Superintendent of Public Works as such.

1. THE APPLICATION OF THE PROVISIONS OF THE FIFTY-NINTH RULE TO THESE CAUSES DOES NOT CHANGE THEIR ADMIRALTY CHARACTERISTICS AND DOES NOT DEPRIVE THE DISTRICT COURT OF JURISDICTION.

We shall hereafter show how immunity from admiralty process does not apply here; how the State may not impose its local law upon the admiralty jurisdiction, how, as between the owner and the charterer of these craft, the liability for disaster must lie with the charterer; and how the State must be presumed to have embarked upon this maritime enterprise in contemplation of the system of maritime law under which the charters were made.

It was claimed by the Attorney General below, and, as we understand it, is now likewise claimed that, these proceedings are not *in rem* and that there is no jurisdiction in the District Court to entertain a cause *in personam* against a State. We had not thought that the Attorney General would persist in this fallacious argument which was so completely answered by the District Judge.

The Attorney General still asserts that these causes do not constitute proceedings *in rem*. The facts are that in each of these causes the admiralty court properly and duly became in possession of the *res* proceeded against by the respective libellants. The proceedings became therefore pure actions *in rem, sui generis*, distinctly maritime in nature, and we submit that the contrary assertion is neither based on fact or supported by law.

Having set forth such assertion, the Attorney General argues that inasmuch as the *res* are not now under charter to, or in the possession of, the State, there is no basis in such proceedings against the property of a stranger for a claim *in personam* against the State. It should be sufficient reply to say that such argument

neglects not only the creation by disaster of a *jus in re* enforceable in admiralty by process *in rem*. The John G. Stevens, 170 U. S. 113, 117, and cases cited; but such argument likewise takes no thought of the liability of the charterer to return the vessel to the owner free from lien. The Barnstable, 181 U. S. 464.

The argument of the Attorney General then proceeds to the contention that no claim can exist *in personam* against the State by reason of the limitation of the Eleventh Amendment. We direct our answer thereto first upon the proposition that these are not, under any consideration, actions at law or in equity falling within the purview of the language of the Eleventh Amendment. Admiralty suits are neither suits at law or in equity, but are spoken of in contradistinction to both. Story, Commentaries on The Constitution, Section 1683, Vol. 3, Original Edition. Admiralty actions are *sui generis*, distinct in character and are not within the term civil suits thereby meaning suits of a civil nature at common law or in equity. United States v. Bright, Federal Cases 14,647, Atkins v. Fiber Disintegrating Co. 18 Wall. 272.

Secondly, we contend that the prerequisite in admiralty to the right to resort to a libel *in personam* is the existence of a cause of action, maritime in its nature. Workman v. Mayor, etc., 179 U. S. 552, 573. Further, a libel *in personam* may be maintained for any cause within the jurisdiction of an Admiralty Court, wherever a monition can be served upon the libelee or an attachment made of any personal property or credits of his. Re Louisville Underwriters 134 U. S. 488, 490. Such was duly done in these causes.

The Attorney General cites in support of his theory the cases of The Governor of Georgia v. Juan Madrazo, 1 Pet. 110, and *Ex Parte* Juan Madrazo, 7 Pet. 627. We submit that neither case is applicable here for in the first named cause Chief Justice Marshall held that because the *res* was not in the possession of the court, it must be treated as a proceeding *in personam* to recover State moneys and therefore a suit against the State, at that time for the original jurisdiction of the Supreme Court. In the later case, he said flatly that the cause was not one where the *res* was in the custody of the Court of Admiralty or brought within its jurisdiction and was not for that reason one for the exercise of such jurisdiction; but that the cause became a mere personal suit to recover proceeds in the possession of the State. We also again submit in this connection that the assumption of the Attorney General that these proceedings are suits against the State of New York is a question which belongs to the merits rather than to the jurisdiction. Scully v. Bird, 209 U. S. 481.

The doctrine laid down by this court in the case of Workman v. Mayor, *supra*, is wholly decisive of the issue here, for no distinction in the applicability of the rule there laid down was made between corporations, municipal or sovereign; the national government alone was excepted therefrom. This doctrine is completely and succinctly stated with reference to the causes at bar and is fully referred to in the following points:

2. THE REASONS WHICH HAVE INDUCED COURTS OF ADMIRALTY TO GRANT IMMUNITY FROM PROCESS HAVE NO APPLICATION HERE.

The claim of the Attorney General of the State of New York, as set forth in his written suggestion, is that these actions constitute suits against the State of New York. This proposition is not conceded, but on the contrary claimants emphatically maintain that such is not true and is not substantiated by the record now before the court; and further that, in any event, the question whether these actions are against the State of New York or not, is one which belongs to the *merits rather than to the jurisdiction*, as is so distinctly the rule as expressed in Scully v. Bird, *supra* and Illinois Central Railroad Company v. Adams, *supra*, referred to and cited under Point I.—2.

Nevertheless, *while not conceding such claim* of the Attorney General, it is thought necessary to here consider the basis thereof and its cogency to the issue at bar.

The position taken by the Attorney General in his suggestion and as orally urged by him upon the District Court, has its basis without doubt in the theory that the State, being a sovereign body, may not be sued without its consent. That such is the time honored rule we freely admit. We shall endeavor to show, however, that in these causes at bar, there exists no reason, either based on principle or recognized by justice, for the granting of immunity from admiralty process or jurisdiction upon the ground of sovereignty of the State of New York, which is the obvious corrollary to the proposition advanced and claimed by the Attorney General of the State of New York.

The cases in which immunity from process has been heretofore claimed and granted on the ground of

sovereignty have no application here for two reasons. First, they are, as far as our examination discloses, actions brought directly against vessels owned or maintained as the property of a sovereign power and at the time of action possessed by it or maintained under its control. In other words the sovereign has necessarily been, by virtue of ownership, the claimant of the vessel or such in effect. Such is distinctly not the case here. Secondly, those cases in which immunity from process upon the ground of sovereignty has been granted are cases either (a) of vessels in the possession of the National Government or (b) vessels of a friendly foreign sovereign.

The principle of immunity granted to vessels in the possession of the National Government was first declared by this court in The Siren, 7 Wall, 153, and again in The Davis, 10 Wall, 15. Both of those cases while laying down the principle upon which such immunity from process is based, i. e. recognition of sovereignty, nevertheless held that the liens in question were capable of enforcement therein because the *possession* of the Government was not disturbed in so doing. In the case of Workman v. Mayor, etc., of New York, 179 U. S., 552, 573, the present Chief Justice, in his opinion, thus sets forth the rule which recognizes the exception as to vessels of the National Government:

> "Of course, as has been repeatedly declared by this court, by the general admiralty law of this country, subject to the exemption from process possessed by the national government a ship, by

> whomsoever owned or navigated, is liable for an actionable injury resulting from the negligence of the master and crew of such vessel. The John G. Stevens, 170 U. S. 113, 120 and cases cited, 122."

The precise statement of this rule recognizing such exception contained in the leading case of The Siren, *supra*, p. 155, is worthy of quotation here:

> "For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose."

The further principle of granting of immunity from process to vessels of a friendly foreign sovereign power apparently has its basis in the decision of The Exchange, 7 Cranch, 116, in which it was held that a public armed vessel in the service of a sovereign at peace with the United States is not within the ordinary jurisdiction of the admiralty court, such privilege being based upon international courtesy. Recent cases occurring during the period of the World War have for the basis of their decision granting immunity from

process of the admiralty court, this observation of the principle of international courtesy, coupled with a desire to refrain from doing anything that would affect the dignity of a friendly sovereign, or strain the amicable relations existing between the two countries.

See *The Maipo*, 252 Fed. 627.
The Roseric, 254 Fed. 154.
The Pampa, 245 Fed. 137.

Nowhere through the various cases which deal with this question of immunity is there to be found a syllable which suggests that the courtesy accorded vessels of the national government or of a friendly foreign sovereign power can by any process of reasoning, be extended to include one of the several States of the United States. If it should be thought that such doctrine should perhaps be so extended, it, nevertheless, could not be extended upon the authority of the cases granting such immunity to vessels of the national government, for that privilege is, by virtue of the very authorities establishing it, granted only where *the actual possession* of the national government *was to be disturbed;* The Davis, *supra.* Here there is no possession of the *res* by the State or by a State officer which was or could be disturbed by these proceedings *in rem.* Nor could such privilege be extended upon the theory of the authorities granting immunity to vessels of a foreign sovereign, for the reason that the *res*, now in possession of the court, *were not*, at the time of taking such possession, either *owned*, *maintained* or *possessed* by the State of New York, by reason of the fact that the

respective charter parties had by their terms expired in December, 1919.

Moreover, a further decisive objection to the propriety of the extension of this privilege to the case of the State of New York, lies in the absence of complete sovereignty in the State of New York. *Sovereignty in its essence means supreme political authority.* Black's Law Dictionary. The sovereignty of one of the several States of the United States is not supreme or paramount in its control of the agencies of government for such sovereignty concededly can only comprise those elements which remain in it, as a political body, following the delegation of powers by the several States to the United States and the further prohibition by the United States of those powers which are to be exercised by it alone. Such State sovereignty is not complete or paramount—it can be only partial. In the light of the express prohibition contained in Section 10 of Article 1 of the Federal Constitution upon the exercise by a State of numerous and varied powers therein recited, all of which powers must be conceded to be commonly incident to the quality of sovereignty, it surely should not be determined that one of the several States of the United States possesses other than partial sovereignty. The right to make treaties, to coin money, to pay and collect taxes, to engage in war, are all so distinctly elements of that supreme and paramount political authority which is denominated "sovereignty," that when divested of such powers a political body fails to function as a sovereign. So it is with the State of New York.

It is therefore urged that no reason which has heretofore induced the granting of immunity from admiralty jurisdiction applies to the causes at bar.

3. THE STATE OF NEW YORK MAY NOT IMPOSE ITS LOCAL LAW UPON THE ADMIRALTY JURISDICTION.

We believe it must be conceded that the judicial power with reference to the administration of maritime rights is vested in the courts of the United States, as is expressed by Article 3, Section 2, of the Constitution. Accepting that premise, the question at issue becomes largely the same as that stated by the present Chief Justice in Workman v. Mayor, etc., of New York, 179 U. S., 552, at page 557 as follows:

> "Although by the maritime law the duty rests upon courts of admiralty to afford redress for every injury to person or property where the subject-matter is within the cognizance of such courts, and when the wrongdoer is amenable to process, nevertheless the admiralty courts must deny all relief whenever redress for a wrong would not be afforded by the local law of a particular State or the course of decision therein. And this, not because, by the rule prevailing in the State, the wrongdoer is not generally responsible and usually subject to process of courts of justice, but because in the commission of a particular act causing direct injury to a person or property, it is considered, by the local decisions, that the wrongdoer is endowed with all the at-

tributes of sovereignty, and therefore as to injuries by it done to others in the assumed sovereign character, courts are unable to administer justice by affording redress for the wrong inflicted".

Such is precisely what the State of New York is seeking in the decision of the present application—a holding that notwithstanding the power of the District Court as a Court of Admiralty to afford redress for the injuries here alleged because of its jurisdiction over the subject matter and vessels; nevertheless such remedy and relief as has been sought by claimant's conformably to the rule must be denied them by reason of the assumed attributes of sovereignty with which the State claims to have endowed itself.

The answer to the proposition advanced by the State of New York is so ably expounded in the present Chief Justice's opinion in the Workman case, *supra*, at pages 558, to 564, that we desire to specially direct the attention of the court again thereto, without however quoting from the same here at length. There the right of libellant to recover damages against the Mayor and other officers of the City *in personam* for injuries resulting from collision of his vessel with a fire boat of the municipality was upheld upon the broad general ground, as we read the decision, that otherwise there would result the practical destruction of a uniform maritime law and a resultant denial of justice if cognizance was given to the premise so advanced. It should be sufficient in fastening the ap-

plicability of this decision upon the matters at bar to further call attention to the fact that the prevailing opinion at page 572 appears to flatly hold *that the theory of sovereign attribute does not control the maritime law and cannot justify an Admiralty Court in refusing to redress a wrong where it has jurisdiction to do so.* So here not only would the granting of the State's application result in the destruction of the uniformity and symmetry of the maritime law as such, but perhaps, as more important to claimants, would result in a denial of justice to claimants, who have concededly sought the relief afforded by Courts of Admiralty conformably to its rules and practice; and that claimants as a result would be left without remedy to recoup such financial loss by reason of the disasters as may be decreed against them in favor of the libellants.

To the same effect as the Workman opinion was the opinion of Mr. Justice McReynolds in Southern Pacific Company v. Jensen, 244 U. S., 205, at page 215, in stating the now accepted settled doctrine of this court:

> "And further, that, in the absence of some controlling statute, the general maritime law, as accepted by the Federal Courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction".

In discussing the proposition of the power of a State to modify or change the general admiralty law by legislation, it was said at page 216:

"And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an Act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotation from The Lottawanna."

The latter decision reported *sub nom* Rodd v. Heartt (The Lottawanna) 21 Wall, 558, contains a precise statement, by Mr. Justice Bradley, of the intention of the founders of the Constitution to provide and maintain a uniform system of maritime law, countrywide in its scope, uniform and consistent in its application, the rules and limits of which shall not be under "the disposal and regulation of the several states". This statement has been many times referred to and set forth in decisions of this court upon questions of the extent and scope of and limitations upon admiralty and maritime jurisdiction and may perhaps be well regarded as the basis of the doctrine which now obtains in all such cases.

See also Union Fish Company v. Erickson, 248 U. S., 308.

4. AS BETWEEN THE OWNERS AND THE CHARTERER, LIABILITY FOR DAMAGE CAUSED BY NEGLIGENCE OF THE OFFICERS AND CREW UNDER THE DOMINION OF THE CHARTERER RESTS WITH THE CHARTERER.

The Attorney General in his brief filed with the District Court urged, among other things, that the doctrine of respondeat superior is not known to the admiralty and argues therefrom that Mr. Walsh, the Superintendent of Public Works, is not personally, aside from his official capacity, responsible for the negligence of those appointed by him and who operated the vessels at the time of disaster. We believe that the decision in the Workman case, *supra*, put an end to any doubt as to the applicability of the doctrine. At all event, it would not seem that such argument was puerile, for in the eyes of the admiralty, it makes little difference whether Mr. Walsh be considered responsible personally for the acts of negligence committed, or responsible therefor in his official capacity as Superintendent of Public Works of the State of New York. The essential fact remains that he was the charterer of the vessels and became liable as such, under the authority of The Barnstable 181 U. S., 464, where it was held "there can be no doubt that, irrespective of any special provision to the contrary, the charterers would be liable for the consequences of negligence in her navigation, and would be bound to return the steamer to her owners free from

any lien of their own contracting, or caused by their own fault". The Barnstable holds flatly therefore that, where, as here, collision damage occurred while the vessel was under charter, such damage being due to the negligence of the officers and crew under the dominion of and paid by the charterer, *that the primary liability* for such damage *rests upon the charterer, and the owner has the right therefore under Rule 59 to call in the charterer to show cause why he should not be condemned for the loss resulting therefrom.*

5. THE STATE OF NEW YORK MUST BE PRESUMED TO HAVE CONTEMPLATED THE SYSTEM OF MARITIME LAW UNDER WHICH THE CHARTERS WERE MADE.

The Superintendent of Public Works concededly must have entered into the charter parties of the "HENRY KOERBER, JR" and "CHARLOTTE" by virtue of the authority given by the legislative enactment known as Chapter 264 of the Laws of 1919 of the State of New York. That act authorized him to engage in the business of towing craft upon the canals of the State, to provide facilities and to collect fees therefor, precisely the same as if any individual, firm or corporation had engaged in the like business of towing vessels upon the canals for profit. Being so authorized to act and having thereafter entered into charter parties of these craft with the owners thereof, the performance of those charter parties is to be regulated by the law which Mr. Walsh must be pre-

sumed to have had in mind when he executed the charter parties, and that law, as we have shown, is the general maritime law, uniform in its application and countrywide in its scope, which may not be limited or controlled in its exercise by the laws or regulations of the several states.

See Watts v. Camors, 115 U. S., 353, 362.
Union Fish Co. v. Erickson, 248 U. S., 308 313.

Further the Superintendent of Public Works must be presumed to have had in view the possibility of disaster occurring during the term of the charter parties when he entered into them and proceeded through their agency with the business of towing craft upon the canals of the State for profit. There are but two results of such possible disasters which he, as a reasonable man, could have contemplated, viz: either that he was bound in operating the vessels of claimants under such charter parties, by the rules of the general maritime law, and, upon the occurrence of disaster creating a lien against said vessels while in his custody, he would become liable therefor, as charterer, in accordance with such rules; or else that he did not regard himself as so bound or as liable as charterer thereof under the general maritime law, but instead contemplated and anticipated the exclusion of any lien or claim for damages occurring during the life of the charter parties, arising from the negligence of himself or his agents in the operation of these craft. Such belief, if indulged in, would neces-

sarily be relied on by virtue of the enactment of the Legislature expressly denying to the Court of Claims of the State of New York jurisdiction to consider claims arising from damages resulting from the navigation of the canals, (Barge Canal Law, Section 47), as well as by virtue of the decision of the Court of Appeals of the State of New York, in Smith vs. State, 227 N. Y., 405, wherein it was held, on an appeal from a judgment of the Court of Claims in an action to recover for personal injuries received upon the State Reservation at Niagara Falls, that the State was immune from liability for the torts of its officers. There is no other or middle course which he might have had in mind. If he regarded himself as liable for such damages as charterer under the general maritime law, he still remains liable by reason thereof. If on the other hand, he regarded himself as being exempt from liability as charterer, due to the enactment of that section of the Barge Canal Law referred to, coupled with the prohibition against a person suffering damage from suing the State as such, it, nevertheless, can avail him nothing, for the reason that his liability is not to be determined here by the provisions of the local law but rather, as we have shown, by the general maritime law which is not to be subjected to emasculation by the local law or regulation of any particular State.

IV. Courts of Admiralty do not countenance depriving litigants of their proper remedy.

1. JUSTICE COMMENDS THE UNLIMITED APPLICATION OF THE PROVISIONS OF ADMIRALTY RULE FIFTY-NINE.

Claimants urge that, inasmuch as they have concededly sought their proper remedy by proceeding in these causes conformably to Admiralty Rule Fifty-nine, that justice requires that claimants be not deprived of their remedy. They have relied upon the assurance of the Rule that they would not be left without a remedy. The State of New York now seeks by this proceeding to frustrate the hope and belie the promise. It is urged that such cannot be permitted because not only was Rule Fifty-nine promulgated by this court itself for the more satisfactory and equitable disposition of actions requiring its application, but also because its application in kindred cases has hitherto been looked upon with favor by this court. We venture to assert that a citizen of the United States who is a party to a suit of admiralty and maritime jurisdiction may not be deprived of the right to have such suit adjudicated by a court upon which admiralty jurisdiction has been conferred by the Constitution. Indeed, the object of Rule Fifty-nine has been said to be remedial and it should be liberally applied to cases which fall within its general scope and purpose. Joice v. Canal Boats, 32 Fed., 553, 554. The reasoning which led the District Judge in "The Alert", 40 Fed., 469, to the conclusion expressed therein has the most complete and precise application in these causes. The damages sued for here are damages accruing while

the vessels were in the possession and under the dominion of the charterer, he was the owner *pro hac vice*, the owners, who have been compelled to interpose as claimants to prevent the sacrifice of their property under admiralty process, are under no personal responsibility for they are strangers to the matters complained of, and without any certain means of ascertaining the facts. If the ship be liable therefor, the charterer is also liable. Nevertheless, if claimants be defeated in admiralty, they are, by express provision of law, barred from any recourse or recoupment as against the charterer by way of indemnity for the losses they have suffered. It would be equally as reasonable and just to arbitrarily relegate libellants to any remedy which they might have directly against the charterer and prohibit their further claim in admiralty as against these claimants as it would be to prohibit claimants in the exercise and maintenance of their rights under the Rule. Moreover, the owners of the vessels had a complete legal right to require that the charterer should return said vessels to them at the expiration of the charter free from liens caused by his fault or neglect. The Barnstable, 181 U. S., 464. Any other rule would only result in a cessation of the practice of chartering vessels and a consequent death blow to American shipping, a result which is not in keeping with the policy of Congress to protect and encourage shipping, as expressed in the acts limiting liability of vessels.

It may be further observed that the State of New York is here seeking to prohibit that which the United

States has recently by Act of Congress expressly granted. We refer to the Act of March 9th, 1920, being Section 1251¼ U. S. Compiled Statutes, Chapter Eleven A, being an enactment authorizing suits against the United States in Admiralty and therein providing for service of process upon, and entry and filing of decrees against, the United States in such action. Suffice it to observe that the Federal Government having embarked in the business of operating vessels for profit, has provided a method for reimbursement for damage created by such operation. It is contended therefore that, with the door to other relief concededly closed in the faces of these claimants by the Legislature and Courts of the State of New York, if there ever were causes wherein justice required the application of the provisions of Admiralty Rule Fifty-nine, that the present actions constitute such causes.

2. THE CHARACTERISTIC UNIFORMITY OF MARITIME LAW AND ITS RULES HAS HERETOFORE BEEN STRONGLY UPHELD BY THIS COURT.

We believe it to be a fair statement that nowhere has this court exhibited greater concern anent any principle submitted to it for consideration and decision than has been indicated by its repeated expressions of its determination to maintain the characteristic countrywide uniformity of maritime law and its rules. Mr. Justice McReynolds in Knickerbocker Ice Company v. Stewart, decided May 17, 1920, not officially reported, in the discussion of the question of admir-

alty and maritime jurisdiction as affected by an award of the New York Industrial Commission, laid down the following doctrine:

> "As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law, and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law, or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.
>
> Since the beginning, Federal Courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states,—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago".

And it was further clearly pointed out therein, after quoting from the decision on which such doctrine is based, i. e. The Lottawanna, *supra*, that the Constitution adopted the rules concerning such rights and liabilities and these were not less paramount than had they been enacted by Congress. *Otherwise it is impossible to account* for a multitude of adjudications by the Admiralty Court such as the Workman case, cited and quoted from at length above.

See also Union Fish Co. v. Erickson, 248 U. S., 308;
Southern Pacific Co. v. Jensen, 244 U. S., 205.

It being established therefore that the characteristic uniformity of the body and rules of maritime law will be upheld by this court and not permitted to be devitalized by the subjecting of the same to the enactments, regulations or desires of the several States, it follows that the application for writs of prohibition and/or mandamus must be denied. For as was said by District Judge Learned Hand, in "The Florence H", 248 Fed., 1012, in discussing the Workman case *supra*, that while it was true that that case involved not a sovereign, but a municipal corporation, and there might, a priori, be ground for distinction between such a party and a sovereign, no such distinction was in fact made, but rather that the decision applied the rule of respondeat superior without exception and in citing "The Siren", *supra*, and "The Athol", 1 Wm. Rob., 374 as confirming the general ap-

plicability of the rule, there was removed any doubt that there then existed any distinction in the mind of the court between corporations, sovereign and municipal.

It being established that the District Court has exclusive original jurisdiction; that all the necessary elements thereof are here present; that there exists liability on the part of the charterer for the collision damages which may not be avoided; that this court has ever upheld the dignity and power of the admiralty to the exclusion of all local regulations or enactments; that no distinction has heretofore been made in the applicability of the Fifty-ninth Rule, it therefore follows that claimants are entitled to the remedy which they have sought and to their day in court in order to maintain the same. Any other conclusion would be in active discord with the equitable principles of the admiralty jurisdiction.

CONCLUSION.

Respondent therefore respectfully submits that upon general principles of law, the rules to show cause should be dismissed and the writs of prohibition and/or mandamus denied.

Respectfully submitted this 3rd day of December, 1920

STANLEY & GIDLEY,
Proctors for Hon. John R. Hazel,
United States District Judge,
Western District of New York

ELLIS H. GIDLEY,
Of Counsel.

INDEX

LIST OF CASES CITED IN MEMORANDUM

In the Supreme Court of the United States

OCTOBER TERM, 1920.

In the Matter of the Petition of THE STATE OF NEW YORK and THE PEOPLE OF THE STATE OF NEW YORK, as owner of the Steam Tug "QUEEN CITY."	No. ——, Original.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS.

And now comes CHARLES D. NEWTON, Attorney-General of New York, on behalf of the State of New York and the People of the State of New York, owners of the Steam Tug "QUEEN CITY," and respectfully moves this Honorable Court:

1. For leave to file the petition for a writ of prohibition and/or a writ of mandamus, hereto annexed.

2. That a rule to be entered and issued directing the District Court of the United States for the Western District of New York and Honorable John R. Hazel, the Judge thereof, and the officers of said Court, to show cause why a writ of prohibition and /or a writ of mandamus should not issue against them and each of them, in accordance with the prayer of said petition, and why the State of New York and The People of the State of New York should not have such other and further relief therein, as may be just.

CHARLES D. NEWTON,
Attorney-General of New York.

October 25, 1920. George A. King

NO.———, ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM, 1920.

In the Matter of the Petition of the STATE OF NEW YORK and THE PEOPLE OF THE STATE OF NEW YORK, owners of the Steam Tug "QUEEN CITY," for a Writ of Prohibition and/or a Writ of Mandamus against the Honorable JOHN R. HAZEL, Judge of the District Court of the United States for the Western District of New York, and the Officers of the said Court.

PETITION FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of CHARLES D. NEWTON, Attorney-General of New York, on behalf of the State of New York and the People of the State of New York, owners of the steam tug "QUEEN CITY," against the Hon. JOHN R. HAZEL, the Judge of the District Court of the United States For the Western District of New York, sitting in admiralty, and the officers of said court, respectfully represents:

First. That the Steam Tug "QUEEN CITY" now is, and at all the times hereinafter mentioned was, the property of the State of New York, in its possession

and control and employed in the public governmental service of the State of New York.

Second. That on October 11, 1920, Martin J. McGahan and Margaret McGahan, as Administrators of the Goods, Chattels and Credits of Evelyn McGahan filed a libel in the District Court of the United States For the Western District of New York, in admiralty against the said steam tug "QUEEN CITY," to recover from the said tug damages in the sum of ($50,000), alleged to have been sustained through the loss of the life of the intestate, Evelyn McGahan, by drowning, and prayed that process issue against said steam tug "QUEEN CITY," her tackle, apparel and furniture, according to the course and practice in admiralty, as will more clearly appear from the certified copy of said libel which is attached hereto, made a part hereof and marked "Paper" "A."

Third. That thereafter your petitioner appearing specially, and not otherwise, for the purpose of questioning the jurisdiction of the court in the United States District For the Western District of New York, filed a suggestion of want of jurisdiction over the steam tug "QUEEN CITY" upon the ground that said steam tug "QUEEN CITY" is the property of the State of New York and The People of the State of New York and used by them solely for public governmental purposes, as will more clearly appear by the certified copy of said suggestion of want of jurisdiction, which is attached hereto, made a part hereof and marked "Paper" "B."

Fourth. That thereafter, Hon. John R. Hazel, Judge of the District Court of the United States For the Western District of New York, overruled and denied the suggestion of want of jurisdiction by an order duly

filed, as will more clearly appear from a certified copy of said order, attached hereto, made a part hereof and marked " Paper " " C."

That attached hereto and made a part hereof and marked respectively Papers " D ", " E ", and " F " and are certified copies of the list of docket entries, order for process and warrant of arrest in the foregoing cause in the District Court in Admiralty. That the papers referred to herein and marked from "A" to " G " constitute the whole of the record proper in the District Court in Admiralty and no more.

Wherefore the said CHARLES D. NEWTON, Attorney General of New York, the aid of this honorable court, respectfully requesting prays:

1. That a writ of prohibition may issue out of this honorable court to the said Hon. John R. Hazel, Judge of the District Court of the United States For the Western District of New York and/or the officers of said court, prohibiting him and them from taking any steps whatsoever in the cause aforesaid, and, generally, from the further exercise of jurisdiction in said causes, or the enforcing of any order, judgment or decree made under color thereof.

2. That a writ of mandamus be issued out of and from this honorably court, directing and commanding the Hon. John R. Hazel, Judge of the District Court of the United States For the Western District of New York, to vacate the order so entered by him, overruling and denying the suggestion of want of jurisdiction and further to enter order in said cause declaring the said steam tug " QUEEN CITY " immune from attachment, arrest or seizure of any kind whatsoever.

3. That the court grant to the State of New York and the people of the State of New York such other and further relief as may be just in the premises.

CHARLES D. NEWTON,
Attorney General of New York and Attorney for THE STATE OF NEW YORK and THE PEOPLE OF THE STATE OF NEW YORK, Owners of the Steam Tug "Queen City."

I have read the foregoing petition by me subscribed, and the facts therein stated are true to the best of my information and belief.

CHARLES D. NEWTON,

Subscribed and sworn to before me
this 25th day of October, 1920.

[SEAL] W. M. THOMAS,
Notary Public.

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PAPER A.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

MARTIN J. McGAHAN and MARGARET McGAHAN, as Administrators of the
27 Goods, Chattels and Credits of EVELYN McGAHAN, Deceased.

Libelants,

against

QUEEN CITY,

28 *Defendant.*

TO THE HON. JOHN R. HAZEL, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK:

The libel and complaint of Martin J. McGahan and Margaret McGahan as administrators of the Goods,
29 Chattels, and Credits of Evelyn McGahan, deceased, against the steam vessel Queen City, her tackle, apparel and furniture, in the cause for damages for personal injuries, civil and maritime, alleges as follows:

First: That libelants are residents of the City of Buffalo, and State of New York, and within the West-
30 ern District of the State of New York; that said steam vessel Queen City, at the times hereinafter mentioned, was engaged in sailing upon maritime waters, including the Erie Canal, in the State of New York, plying between various points upon said canal particularly in the vicinity of Buffalo, New York.

Paper A

Second: That on the 26th day of July, 1919, while said Queen City was being so used and operated on said maritime waters, being the Erie Canal, in the vicinity of Buffalo, New York, libelants' intestate, Evelyn McGahan, was permitted, invited and induced by said vessel to ride as a person, guest or passenger thereon; that by reason of the negligence and carelessness of said Queen City and those owning and operating the same, being the negligence and carelessness of said vessel while being so sailed and operated in said maritime waters in the Western District of New York; that said vessel was not properly equipped according to the maritime rules and requirements for the purpose of carrying passengers, guests or persons, or for the purpose of carrying said intestate, had not the necessary complement of crew required by the United States laws and rules applicable and in force at the time; had not been inspected or properly licensed or certified by duly authorized inspectors for the purpose of carrying passengers, guests, or persons, including intestate; was not equipped with necessary life preservers, guards and equipment, necessary safety devices for the protection and accommodation of said passengers, guests or persons, did not have the necessary and required life preservers, and did not have the same properly placed and ready for use; did not have the necessary and required seating capacity; was overcrowded, was not sufficiently lighted; did not have proper and necessary number of suitable chairs and benches to sit upon; was being operated and sailed in violation of the laws of the United States and the requirements pertaining to navigation applicable and in force; had upon it a greater number of passengers,

36 *Paper A*

guests, or persons that could be safely carried or accommodated thereon, all of which was by reason of the negligence and carelessness of said vessel Queen City; that said vessel was not supplied with sufficient or proper life preservers, and life saving apparatus, appliances and equipment; did not have proper and suit-
37 able railings or guards upon or about its decks, constructed and placed for the purpose of protecting those riding on her by reason of the negligence of said vessel Queen City, and by reason of which said Queen City was dangerous and unsafe to ride upon and dangerous and unsafe to libelants' intestate who was permitted, invited and induced to ride thereupon, by
38 reason of which said intestate lost her life by drowning.

Third: Libelants further allege that said vessel, Queen City, and its master and those in control and management of the same negligently and knowingly permitted said vessel to be so used for the purpose of carrying persons, passengers or guests, including in-
39 testate, unlawfully, and without license or authority, and without such proper and adequate equipment, and when the same was, by reason of the facts hereinbefore alleged, unsafe and dangerous to ride upon by reason of which negligence intestate lost her life by drowning.

Fourth: That said decedent was a woman of the
40 age of twenty-two years, a resident of the State of New York, in good health, and was in the employ of the United States Government as a stenographer, typist, or clerk at Fort Porter, Buffalo, New York; that her earnings, as libelants are informed and believe, were $83.33 a month; that said decedent was

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Paper A

unmarried and was living with these libelants and administrators, who were, and are, her father and mother; that said decedent was contributing to the support and maintenance of her said father and mother and her earnings were applied and used for that purpose in large part.

42 Fifth: That heretofore and on the 29th day of November, 1919, the libelants were duly appointed administrator and administratrix of the Goods, Chattels, and Credits of the estate of said deceased and as such are the owners of the cause of action for which this libel is made, and have a right to prosecute the same by Letters of Administration duly issued by the Sur- 43 rogate's Court of Erie County, New York, on the date above mentioned, after due proceedings had in said court, and said libelants are now acting as such administrators; that said Letters of Administration are limited letters and authorize and empower these libelants to present and prosecute this libel and to collect and distribute any damages recovered under the 44 order of said court, as such alministrators.

Sixth: That by sections 1902, 1903, 1904, 1905, of the Code of Civil Procedure of the State of New York, libelants are authorized and empowered to prosecute and recover herein for the recovery of damages for the death of said decedent against said vessel, Queen City.

45 Seventh: That by reason of said negligence of said vessel Queen City, and the death of said intestate resulting therefrom libelants have been, and were, damaged in the sum of Fifty Thousand Dollars ($50,000.00).

Eighth: That all and singular the premises are true

Paper A

and within admiralty and maritime jurisdiction, and this honorable court, in verification whereof, if denied, the libelants herein crave leave to refer to the depositions and other proofs to be by them exhibited in this cause.

WHEREFORE, The libelants pray that process in due form of law according to the course of this honorable court in causes of admiralty and maritime jurisdiction, may issue against said vessel Queen City, her tackle, apparel, and furniture, and that all persons have or pretending to have any right, title or interest therein, may be cited to appear and to answer all and singular the matters and things hereinbefore set forth and for a jury trial of the issues herein, and that this honorable Court would be pleased to decree the payment to these libelants of the sum of Fifty Thousand Dollars ($50,000.00) for their damages aforesaid, with costs, and that the libelants may have such other and further relief in the premises as in law and justice they may be entitled to receive.

HALEY & UECK,
Attorneys for Libelants,
Office and P. O. Address,
425 Ellicott Square,
Buffalo, N. Y.

STATE OF NEW YORK,
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK, } *ss.:*

MARTIN J. MCGAHAN, being duly sworn, deposes and says that he is one of the libelants in this action, that he has read the foregoing libel and knows the contents

Paper A

thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. 51

MARTIN J. McGAHAN.

Subscribed and sworn to before me
this 9th day of October, 1920. 52

JOSEPH M. CARRIERO,
Notary Public, Erie County, N. Y.

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF NEW YORK, } *ss.:*

I, HARRIS S. WILLIAMS, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the annexed copy of Libel with the original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original. 53

And I further certify that I am the officer in whose custody it is required by law to be. 54

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City
[SEAL] of Buffalo, in said District, this 27th day of October, A. D. 1920.

HARRIS S. WILLIAMS,
Clerk. 55

PAPER B

District Court of the United States

Western District of New York

MARTIN J. McGAHAN and MARGARET McGAHAN as Administrators of the Goods, Chattels, and Credits of Evelyn McGahan, Deceased, *Libelants,* *against* QUEEN CITY, *Defendant.*	Suggestion of want of jurisdiction

Now comes CHARLES D. NEWTON, Attorney General of New York, by his Deputy, Edward G. Griffin, appearing specially, and not otherwise, for the purpose of questioning the jurisdiction of the Court, as Proctor for the State of New York, the People of the State of New York and the steam vessel "QUEEN CITY" and respectfully suggests that this Honorable Court is without jurisdiction to proceed herein for the reason that the "QUEEN CITY" now is, and was at all the times mentioned in the libel herein the absolute property of the State of New York in its possession and control and is now employed in the public service of the State for public State and Governmental uses

and purposes, and was authorized by law at all the times mentioned in the libel herein to be employed only for the public State and Governmental uses and purposes of the State of New York and none others. That such Governmental uses and purposes are generally the repair and maintenance of the Improved Erie Canal, a public work owned and operated by the State of New York, and particularly the towing of dredges, carrying of materials and workmen and the towing of barges and vessels containing materials, the setting, replacing and removing of buoys, signals and safety devices in all works of repair, operation and maintenance of said canal.

That substantially the same cause of action was set forth in the claim of Martin J. McGahan and Margaret McGahan, Administrators of the Goods, Chattels and Credits of Evelyn McGahan, deceased against The State of New York in the Court of Claims of the State of New York. That said Court of Claims dismissed said claim for want of jurisdiction as will more fully appear by duly certified copies of said, Claim, Affidavit and Judgment Dismissing Claim, attached hereto, made a part hereof and marked respectively "papers" "1," "2" and "3." That further the State has disclaimed all liability for the cause of action alleged in said claim and the libel herein under the proviso contained in Section 47 of the Canal Law of the State of New York (Consolidated Laws, Ch. 5, L. 1919, Ch. 13) providing as follows: "provided that the provisions of this section shall not extend to claims arising from damages resulting from the navigation of the canals." That an appeal is now pending by the claimants therein, being the same as the libelants herein, in the Supreme Court of the State of New

66 *Paper B*

York, Appellate Division, 4th Department from the aforesaid judgment of the Court of Claims and remains at this time undecided.

Wherefore the said CHARLES D. NEWTON, Attorney-General of New York without submitting the rights of the State of New York or the People of the State of New York or the steam vessel "QUEEN CITY" to
67 the jurisdiction of the Court, but appearing specially, and not otherwise, suggests that the cognizance of this cause belongeth not to the Court and prays that said steam vessel "QUEEN CITY" be declared immune from process and free from seizure and attachment, and that the libel filed in the above cause and all pro-
68 ceedings had thereunder be dismissed for want of jurisdiction, and that such order may be entered in the premises as may be proper.

Dated October 21, 1920, Albany, N. Y.

CHARLES D. NEWTON,
Attorney-General of New York.
By EDWARD G. GRIFFIN,
69 *Deputy Attorney-General,*

Appearing specially and not otherwise, as Proctor for the State of New York, the People of the State of New York and the steam vessel 'Queen City."

Office and P. O. Address,
70 The Capitol, Albany, N. Y.

STATE OF NEW YORK,
CITY AND COUNTY OF ALBANY, } *ss.:*

I have read the foregoing suggestion of want of jurisdiction, by me subscribed and the facts therein

Paper 1

stated are true to the best of my information and belief.

EDWARD G. GRIFFIN,

Subscribed and sworn to before me
this 23rd day of October, 1920.

F. J. SCHILLING,
Notary Public, Rens. Co., N. Y.
Certified filed in Albany Co.

PAPER 1

STATE OF NEW YORK.— COURT OF CLAIMS.

MARTIN J. McGAHAN and MARGARET McGAHAN, Administrators of the Goods, Chattels and Credits of Evelyn McGahan,

Deceased,

against

THE STATE OF NEW YORK.

As Amended

1. The postoffice address of the claimants herein is 280 Vermont Street, City of Buffalo, State of New York.

2. This claim is for negligence of the State of New York in knowingly and with the privity and knowledge of the State of New York, in sailing and operating a certain vessel or tug boat known as and called the Queen City belonging to the State of New York, by the officers, agents and servants of the State of New York, in, on or through United States Waters on the Erie Canal between the Cities of Tonawanda, N. Y.,

and Buffalo, N. Y., at some point between West Ferry Street in the City of Buffalo, N. Y., and the City of Tonawanda, N. Y., carrying passengers, guests and persons, including plaintiffs' intestate Evelyn McGahan, deceased, in violation of the laws of the United States and the State of New York, and the laws, rules and regulations of the United States pertaining to navigation of such vessels, including the said vessel Queen City, without license or authority to carry persons, guests and passengers, including plaintiffs' intestate, without proper equipment for that purpose or for sailing in United States waters and in the waters of the Erie Canal, and where said boat was at the time of the accident; without the proper and necessary inspection for said purpose required by the laws of the United States and the regulations pertaining to navigation in United States and Erie Canal waters, without the proper means and equipment for preventing or saving passengers, guests and persons riding upon said boat from drowning, such as is required by law, particularly suitable and proper railings about the decks, gunwales and bulwarks and passageways of said vessel, and suitable and proper life-saving apparatus; without the necessary and proper seating capacity and accommodations for such persons, guests and passengers being so carried without the necessary safeguards and protection of said persons, guests and passengers to prevent them from falling off or being thrown or dragged from said vessel or tug boat, and while said vessel or tug boat for said above reasons was in a dangerous and unsafe condition in or upon which to carry passengers, guests or persons, all of which was by reason of the negligence and carelessness and privity and knowledge of the State of New

York, its officers and servants, by which plaintiffs' intestate Evelyn McGahan, deceased, being a passenger, guest or person upon said vessel at the time, fell or was thrown or dragged from said vessel into the waters of said canal on the 26th day of July, 1919, by reason of which she lost her life.

The nature of said claim and the circumstances surrounding the occurrence thereof pertaining to the negligence of the State are more fully hereinafter set forth.

That said accident and death occurred without any negligence on the part of said decedent.

3. This claim has not been assigned, and has not been submitted to any other tribunal or officer for audit or determination.

4. Attached hereto is a copy of the notice of intention to file this claim, which notice was filed in the office of the Clerk of the Court of Claims on the twenty-second day of January, 1920, and in the office of the Attorney-General on the twenty-second day of January, 1920, and in the office of the Superintendent of Public Works on the twenty-second day of January, 1920.

5. This claim is filed within two years after the claim accrued, as required by law.

6. Attached hereto as a part of the claim is a rough sketch of the place of the accident.

7. The nature of said claim and particulars of claimants' damages are as follows:

That heretofore and on or about the 26th day of July, 1919, the State of New York was the owner of and by its officers, agents and servants was operating or sailing a certain vessel or tug boat known as and called the Queen City, which was sailing and was

being operated by the State of New York, its officers, agents and servants on the Erie Canal between the cities of Tonawanda, N. Y., and Buffalo, N. Y., the precise point between said cities being West Ferry street in said City of Buffalo, N. Y., and southerly boundary of the City of Tonawanda, N. Y.; that said boat was being used by or was being sailed or operated by the State of New York, its officers, agents and servants, with the privity and knowledge of the State of New York, and was engaged in carrying persons, guests and passengers, being a picnic party of about thirty or more people, all of which were members or guests or friends of the Holy Angels Choir or singing society of the Holy Angels Church of Buffalo, N. Y.; that above named Evelyn McGahan was one of said persons, guests and a passenger on said vessel, and was being so carried and transported as such person, guest or passenger by the State of New York, its officers, agents and servants in and through the said Erie Canal at the point or place above designated; that said passengers, guests, and persons, including the said deceased, had been carried and transported from the City of Buffalo, N. Y., to Tonawanda, N. Y., in the vicinity of Pendleton, N. Y., and the said vessel was at the time of the accident, hereinafter described, engaged in carrying and transporting said passengers, guests, or persons, including the said Evelyn McGahan, from said vicinity of Pendleton back to Buffalo in and through the Erie Canal, which is used by the State of New York; that during the course of said voyage said vessel entered and passed through Federal or United States water; that said vessel was at the time of said voyage, and at the time of said accident, heretofore and hereinafter described, not properly equipped for

carrying said passengers, guests, or persons; had not the necessary complement of crew required by the United States laws and rules applicable and in force at the time; had not been inspected or properly licensed or certified by duly authorized inspectors for the purpose of carrying said passengers, guests, or persons on said voyage, and was not equipped with necessary life preservers, guards and equipment for the protection and accommodation of said passengers, guests, or persons, and was not sufficiently lighted for that purpose, and was not equipped with a proper number of suitable chairs or benches to sit on for the accommodation of said passengers, guests, or persons, including deceased, and was being operated and used for the purpose of carrying said persons, guests, or passengers, including the deceased, in violation of the United States laws and of the regulations pertaining to navigation applicable and in force; that said vessel was over-crowded by reason of having taken on a greater number of passengers, guests, or persons than could be safely carried or accommodated on board said vessel; that the State of New York and the officers and agents thereof having the duty to operate, care for and control said vessel were negligent and careless in all the respects above mentioned wherein said boat was deficient and not properly licensed, certified, manned, or equipped and fitted out for the purpose of carrying persons, guests or passengers, including deceased, on the voyage or trip above mentioned, and in the use of said boat for the purpose of carrying persons, guests, and passengers, including said deceased, and in violation of United States laws and regulations pertaining to navigation, and the said vessel was at the

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time of said accident being negligently and carelessly operated and handled and in violation of the United States Laws by the State of New York, its agents, officers and employees; and with the privity and knowledge of the State of New York; that said vessel was not supplied with sufficient or proper life saving
97 apparatus, appliances and equipment, particularly in the fact that proper and suitable railings or guards were not constructed, placed or erected about the deck or gunwales or bulwarks of said vessel Queen City sufficient to properly protect passengers, guests, or persons riding on said vessel, the absence of which safeguards, appliances and equipment rendered said
98 vessel dangerous, and the situation of persons, guests, or passengers, including decedent, riding upon said vessel at the time, dangerous to life; that by reason of the lack of equipment, safeguards and appliances, and the proper measures, devices and equipment for the protection of said passengers, guests, or persons, some of said passengers, guests or persons, including de-
99 ceased, were compelled to sit on the side or gunwale, or bulwark of said boat, and were permitted so to sit by the State of New York, its officers, servants, agents and employees while traveling as persons, guests, or passengers upon said vessel; that by reason of the premises above stated, the decedent, a person, guest and passenger on said boat and in the care and pro-
100 tection thereof was thrown from said vessel or caused to fall or dragged therefrom, into the waters of the Erie Canal, and thereby came to her death.

That said vessel Queen City was owned by the State of New York, and used exclusively in connection with the canals owned and cared for and operated by the State of New York, and in such care and

in the upkeep and repair of said canals, and the management thereof, by officers of the State including the superintendent of said canals, Charles J. McDonough, and the captain or master of said boat, Charles J. Day, in charge thereof and of said canals and the crew, and employees engaged upon and in connection with said vessel, and the said vessel, while in charge of said officers and employees was being used by them upon the canals thereof, so in the charge of said officers, at the time of said accident.

This claim is filed, and claimant claims herein, under Section 47 of the Canal Law of the State of New York, also under Section 264 of the Code of Civil Procedure.

That the said decedent was a woman of the age of twenty-two years, a resident of the City of Buffalo, State of New York, in good health, and was in the employ of the United States Government as a stenographer, typist or clerk at Fort Porter, Buffalo, N. Y., that her earnings, as claimants are informed and believe, were eighty-three dollars and thirty-three cents ($83.33) a month; that said decedent was unmarried and was living with these claimants and administrators who were and are her father and mother; that the said decedent was contributing to the support and maintenance of her said father and mother, and her earnings were applied and used for that purpose in large part.

That heretofore and on the 29th day of November, 1919, the claimants were appointed administrators of the goods, chattels and credits and of the estate of the said deceased and of the claims herein referred to, and as such are the owners of said claim and have a right to prosecute the same by Letters of Administration

Paper 1

duly issued by the Surrogate's Court of Erie County on the date above mentioned after due proceedings had in said court, and said claimants are now acting as said administrators; that said Letters of Administration are Limited Letters, and authorize and empower these claimants to present and prosecute the claim herein referred to, and to collect and distribute the same under the order of said court as such administrators.

That two years have not elapsed since this claim accrued or since the happening of said accident and the death of said decedent, Evelyn McGahan; that the amount of said claim hereby presented and filed is fifty thousand dollars ($50,000.00); to wit: undertaker's bill three hundred dollars ($300.00); lot in cemetery, sixty-six dollars ($66.00), and balance amounting to forty-nine thousand six hundred thirty-four dollars ($49,634.00), loss sustained by estate of next of kin of Evelyn McGahan, deceased, by reason of her death.

HALEY & UECK,
Attorneys for Claimants,
Office and P. O. Address,
425 Ellicott Square,
Buffalo, N. Y.

STATE OF NEW YORK,
CLERK'S OFFICE, COURT OF CLAIMS, } *ss.:*
CAPITOL, CITY OF ALBANY.

I, WILLIAM E. CONNORS, Deputy Clerk of the Court of Claims of the State of New York, do hereby certify, That I have compared the foregoing and annexed copy of the amended claim of Martin J. McGahan and Mar-

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garet McGahan, Administrators of the goods, chattels and credits of Evelyn McGahan, deceased, Claim No. 16548, filed February 27, 1920, against the State of New York with the original thereof on file and of record in this office, and that the same is a correct transcript therefrom.

IN TESTIMONY WHEREOF, I have hereunto set 112
my hand and affixed the seal of said Court
[SEAL] of Claims at the Capitol, in the City of
Albany, N. Y., this 23d day of October,
A. D. 1920.

WM. E. CONNORS,
Deputy Clerk of the Court of Claims.

113

PAPER 2

STATE OF NEW YORK — COURT OF CLAIMS.

MARTIN J. McGAHAN and MARGARET M. McGAHAN, Administrators of the Goods, Chattels and Credits of EVELYN McGAHAN, Deceased, *Claimants,* *against* THE STATE OF NEW YORK. } Claim No. 16548. 114

STATE OF NEW YORK, COUNTY OF ALBANY, CITY OF ALBANY, } *ss.:* 115

CAREY D. DAVIE, being duly sworn, deposes and says that he is a Deputy Attorney General of the State of New York and as such has the general charge for and on behalf of the Attorney General's office of matters

116 *Paper 2*

pending in the Court of Claims against the State of New York.

That the above entitled claim, as appears from the records of said court, was filed in the office of the Clerk of the Court of Claims on the 27th day of February, 1920, and that the filing of said claim was pre-
117 ceded by the filing of a notice of intention herein, such notice having been verified on the 21st day of January, 1920.

Deponent further says, as will more fully appear from an inspection of said claim, that said claim was filed for the purpose of recovering against the State the sum of $50,000 damages occasioned from the
118 death of claimants' intestate, Evelyn McGahan, as is alleged, through and in consequence of the negligence of the State of New York, its officials, servants and employees, and that deponent hereby specifically refers to said claim and all of its allegations for the purpose of showing that said claim is based upon the alleged negligence of said State officials.

119 Deponent further says that it is the contention of the Attorney General's office that said claim fails to state facts sufficient to constitute a cause of action against the State and that the acts herein alleged and upon which said claim is predicated are acts from which the State is immune from all damages and from liability.

120 Deponent further says that no former application has ever been made for an order dismissing or discontinuing said claim.

CAREY D. DAVIE.

Subscribed and sworn to before me
this 9th day of April, 1920.

LILLIAN C. CHASE,
Notary Public.

PAPER 3 121

STATE OF NEW YORK.—COURT OF CLAIMS.

MARTIN J. McGAHAN and Another as Administrators, etc.,
Claimants,
against
STATE OF NEW YORK.

Claim No. 16548.

122

An order having been heretofore duly granted requiring the above named claimants to show cause at a regular session of the Court of Claims held at the City of Buffalo on May 10, 1920, why the above entitled claim should not be dismissed and the State of New York having duly appeared upon the return of 123 said order, to wit: May 10, 1920, at the City of Buffalo, N. Y., by Carey D. Davie, Deputy Attorney-General, and the above named claimants having also then and there duly appeared by their attorneys, Messrs. Haley & Ueck, and having heard the arguments in support of and in opposition to said motion and after due deliberation thereon, 124

It is now hereby ordered that the above named claim be and the same is hereby in all things dismissed and discontinued for the reason and upon the ground:

First. That said claim does not state facts sufficient to constitute a cause of action against the State of New York. 125

Second. That the facts alleged and set forth in said claim do not allege or state a liability upon or cause of action against the State.

Dated at Albany, N. Y., this 29th day of June, 1920.

FRED M. ACKERSON,
WILLIAM W. WEBB,
Judges of the Court of Claims.

120 *Paper 3*

STATE OF NEW YORK,
CLERK'S OFFICE, COURT OF CLAIMS,
CAPITOL, CITY OF ALBANY. } *ss.;*

I, WILLIAM E. CONNORS, Deputy Clerk of the Court of Claims, of the State of New York, do hereby certify,
127 That I have compared the foregoing and annexed copy of the order in the claim of Martin J. McGahan and another as administrators, etc., Claim No. 16548, (dismissing the claim) against the State of New York with the original thereof on file and of record in this office, and that the same is a correct transcript therefrom.

128 IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court [L. S.] of Claims at the Capitol, in the City of Albany, N. Y., this 23rd day of October A. D. 1920.

WM. E. CONNORS,
Deputy Clerk of the Court of Claims.

129 At a Term of the United States District Court held in and for the Western District of New York in the Federal Building in the City of Buffalo, N. Y., on the , day of October, 1920.

Present:

130 Hon. JOHN R. HAZEL,
District Judge Presiding.

Paper 3 131

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF NEW YORK, } ss:

I, HARRIS S. WILLIAMS, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the annexed copy of Suggestions of Want or Jurisdiction with the papers annexed thereto, with the Original 132 entered and on file in your office, and that the same is a correct transcript therefrom, and of the whole of said Original.

And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City 133
[SEAL] of Buffalo, in said District, this 14th day of October, A. D. 1920.

HARRIS S. WILLIAMS,
Clerk.

At a Term of the United States District 134
Court held in and for the Western District of New York in the Federal Building in the City of Buffalo, N. Y., on the 28th day of October, 1920.

Present:

HON. JOHN R. HAZEL,
District Judge Presiding. 135

8

136 PAPER C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

MARTIN J. McGAHAN and MARGARET McGAHAN as Administrators of the Goods, Chattels and Credits of 137 EVELYN McGAHAN, Deceased. *Libelants,* *against* QUEEN CITY, *Defendant.*	Order Overruling Suggestion Of Want of Jurisdiction.

138 A libel having been filed herein by the above named libelants against the steam vessel "Queen City" on the 11th day of October, 1920, and Charles D. Newton, Attorney General of New York, having appeared specially, and not otherwise, for the purpose of questioning the jurisdiction of the court as Proctor for the State of New York, The People of the State of New 139 York and the steam vessel "Queen City," and having filed a suggestion of want of jurisdiction herein on the 25th day of October, 1920, and a copy of said suggestion of want of jurisdiction having been served upon the libelants herein.

Now after reading the libel and the suggestion of want of jurisdiction herein and due deliberation hav- 140 ing been had thereon, it is,

ORDERED that the suggestion of want of jurisdiction herein be and the same hereby is overruled and denied with costs.

Enter:

JOHN R. HAZEL,
D. J.

Paper D 141

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF NEW YORK, } ss.:

I, HARRIS S. WILLIAMS, Clerk of the District Court of the United States for the Western District of New York, do hereby certify that I have compared the annexed copy of Order Overruling Suggestion of Want of Jurisdiction with the Original entered and on file 142 in this office, and that the same is a correct transcript therefrom, and of the whole of said Original.

And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City 143
[SEAL] of Buffalo, in said District, this 27th day of October, A. D. 1920.

HARRIS S. WILLIAMS,
Clerk.

PAPER D

DOCKET. 144

MARTIN J. McGAHAN and MARGARET McGAHAN as Administrators of the Goods, Chattels and Credits of EVELYN McGAHAN, Deceased,

against

Steam Vessel "QUEEN CITY," Her Tackle, Apparel and Furniture. 145

Haley & Ueck Solr's for Libelant.

Damages for personal injuries $50,000 and costs.

October 11, 1920, Deposit by Haley & Ueck, Attys $10 00

156 *Paper F*

And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City [SEAL] of Buffalo, in said District, the 8th day of November, A. D. 1920.

157 HARRIS S. WILLIAMS,
Clerk.

PAPER F

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF NEW YORK, } *ss.:*

The President of the United States of America to the
158 *Marshal of the Western District of New York, and to His Deputy, Whomsoever,*

GREETING:

You are hereby jointly and severally empowered, and strictly enjoined, and commanded, that you arrest the Steam vessel called the "Queen City," her engines, boilers, machinery, boats, tackle, apparel and
159 furniture, if she shall be found within your district; and the same so arrested you keep under safe and secure arrest until you shall receive further orders from the said court, or the same shall be discharged in the due course of law; and that you cite at the premises all persons in general who have, or pretend to have any right, title or interest therein, to appear
160 before the Judge of the District Court of the United States of America, for the Western District of New York, at the city of Buffalo, N. Y., on the 2nd day of November, 1920, if it be a court day, or else on the court day next following, at ten o'clock in the forenoon, there to answer unto the Libel of Martin J. McGahan and Margaret McGahan, as Administrators of the Goods, Chattels and Credits of Evelyn

161

Paper F

McGahan, Deceased, in a cause of damages for personal injuries, civil and maritime.

And further to do and receive in this behalf, as to justice shall appertain; and that you duly certify the Judge of the aforesaid court what you shall do in the premises, together with these presents.

WITNESS, The Honorable JOHN R. HAZEL, Judge of 162
the aforesaid court, at the City of Buffalo, this 11th day of October in the year of our Lord one thousand nine hundred and twenty.

Action for $50,000 and costs, $250.

AY C. SICKMON,
Chief Deputy Clerk. 163

Messrs. HALEY & UECK,
(Seal Here) *Proctors for Libelant.*
45 Ellicott Square, Buffalo, N. Y.
Received Oct. 11, 1920
U. S. Marshal, Buffalo.

MARSHAL'S RETURN ON BONDING VESSEL.

In Obedience to the within writ, I did on the 11th 164
day of Oct. 1920, at Buffalo, in my district, arrest the within mentioned vessel Queen City, her tackle, &c.; and I duly cited all persons to appear, as within commanded.

Subsequently, and on the ——— day of ———, 191 , having received a bond, duly executed and approved, conditioned to abide the decree of the court 165
in this cause, I did release the said vessel, and return the said bond herewith.

Dated the ..... day of ....., 191 .

JOMN D. LYNN,
U. S. Marshal.
By FRANK H. RINE,
Deputy.

176 II.

"A Vessel Operated by a State in a Governmental Capacity is Exempt From Process in Admiralty Under Rules of Comity."

It is well established that government vessels of the United States, and, indeed, of foreign governments, are exempt from Admiralty process under rules of
177 comity. The learned Judge below in his opinion in the "Koerber" and "Charlotte" causes says this exemption has never been applied to a State of the Union. Yet, this exemption was held at the time of the Confederation to apply equally to a ship of war belonging to a State (evidently South Carolina) *Moietz* v. *South Carolina*, 17 Fed. Cases No. 9,697. The
178 immunity was held to apply in favor of a tug and dredge used by the Port of Portland, in a suit against them by the United States, *The John McCracken*, 145 Fed. 705. The immunity likewise saved an ice-boat of the City of Baltimore, *The F. C. Latrobe*, 28 Fed. 377. *In Workman* v. *New York City*, 179 U. S. 552, it
179 appeared that a municipal fire-boat was exempt *in rem*, but the city was liable *in personam*. A State however, partakes more of the attributes of sovereignty, while a municipal corporation does not necessarily. Therefore, even the action over *in personam* cannot be maintained against a State, for the reasons given in our memorandum in the "Koerber" and "Charlotte" motions. For further cases illustrative
180 of these propositions we refer to 1 *Corpus Juris* under title "Admiralty" page 1263, sections 56–59.

Dated, Albany, N. Y., October 26, 1920.

Respectfully submitted,

CHARLES D. NEWTON,
Attorney-General of New York.

Edward G. Griffin,
Deputy Attorney-General.

George A. King

No. 26, ORIGINAL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

IN THE MATTER OF THE PETITION OF THE STATE OF NEW YORK FOR A WRIT OF PROHIBITION OR MANDAMUS AGAINST THE HON. JOHN R. HAZEL, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK, IN A PROCEEDING IN A CASE OF ADMIRALTY AND MARITIME JURISDICTION PENDING IN SAID COURT, ENTITLED:

MARTIN J. McGAHAN AND MARGARET McGAHAN, AS ADMINISTRATORS OF THE GOODS, CHATTELS AND CREDITS OF EVELYN McGAHAN, DECEASED,

Libellants,

vs.

QUEEN CITY,

Defendant.

RETURN

I, John R. Hazel, Judge of the District Court of the United States within and for the Western District of New York, for and in behalf of myself and the officers of said court, in obedience to the order to show cause herein issued out of the Supreme Court of the United States on the 22d day of November, 1920, upon the petition therefor by Hon. Charles D. Newton, Attorney-General of the State of New York, direct-

ing me and said officers of said court to show cause why a writ of prohibition, a writ of mandamus, or both, should not issue against me and said officers in accordance with the prayer of said petition, hereby appear, certify and make return herein as follows:

1. Answering paragraph "First" of said petition, attention is called to the fact that the records and proceedings in the suit in admiralty above entitled and referred to in the paragraph marked "Second" in said petition, do not disclose the identity of the owner of the vessel or who had possession and control of and was employing it at the time of the commission of the marine tort alleged in the libel in said suit, or that said vessel was being employed in governmental service of the State of New York.

No person, corporation, or state has appeared in said suit or made claim of ownership of said vessel or excepted or answered to said libel.

Therefore, the allegations contained in said first paragraph are not admitted.

2. Answering paragraph "Second" of said petition, it is true that on October 11, 1920, Martin J. McGahan and Margaret McGahan, as Administrators of the Goods, Chattels and Credits of Evelyn McGahan, Deceased, filed a libel in the District Court of the United States for the Western District of New York, in admiralty, against the steam tug Queen City to recover damages in the sum of Fifty Thousand ($50,000.00) dollars, alleged to have been sustained through the loss of the life of said deceased by drowning and the "Paper" referred to as "A" in said petition is a true copy of said libel.

3. Answering paragraph "Third" of said petition it is true that petitioner afterwards appeared specially, and not otherwise, for the purpose of questioning the jurisdiction of said court in said suit and filed suggestions of want of such jurisdiction over said steam tug Queen City upon the ground that said tug is the property of the State of New York and the People of the State of New York and used by them solely for public and governmental purposes, and the "Paper" marked "B" is a true copy thereof.

4. Answering paragraph "Fourth" of said petition it is true that I overruled said suggestions by an order duly entered and filed, and the "Paper" referred to in said paragraph as marked "C" is a true copy thereof. And also the "Papers" therein referred to as marked "D," "E," "F" are true copies of the list of docket entries, order for process, and warrant of arrest in said suit. And also it is true that the "Papers" referred to in said paragraph as marked from "A" to "G" constitute the whole of the record proper in the District Court and no more.

5. Further answering said petition, I beg to state that the jurisdiction of said District Court within the territorial limits of said district is, in admiralty, original and exclusive. The libel sets forth all facts necessary to support such jurisdiction and contains nothing upon which any claim of lack of jurisdiction can be based. The alleged facts as to the ownership of said vessel by the State of New York and the use thereof for governmental purposes subsequently and extraneously brought forth by petitioner, do not appear in the libel.

Whether it be a question of jurisdiction originally, or of subsequent ouster of jurisdiction originally properly obtained, or a mere question as to the exercise of the powers of the court of admiralty having jurisdiction, such question or questions ought to, and can only be litigated and passed upon in the case on the merits in the regular proceedings and practice in this court and in all admiralty courts, that is, an appearance by the State, claim of ownership of the vessel, plea of its sovereignty as a defense. If such plea be overruled then the State has another remedy, viz.: appeal to the Circuit Court of Appeals, and review of the decision of that court by the Supreme Court of the United States. As such proceedings and remedy are available to the State, prohibition does not lie.

Furthermore, if the usual and regular course and remedy be taken by the State by appearance in the suit, exception or answer, questions as to whether the State is liable in personam which may arise and be made available to libellants by an amendment of the libel; questions as to whether the State has not waived its immunity for such liability by virtue of Section

47 of the Canal Law of the State of New York, and Section 264 of the Code of Civil Procedure of said State; questions as to whether or not the use of the vessel in question by the State, through and by employees or officers, in the maintenance and operation of the canals of the State for commercial purposes, was using said vessel in such a governmental function as will oust the jurisdiction of the admiralty court over it; questions as to whether the State can defeat the exclusive and paramount jurisdiction and power of a federal court otherwise having jurisdiction in admiralty by a plea based on its sovereign attributes as such owner and operator; may be properly litigated and determined, and reviewed by the higher courts, on the merits. They cannot be so properly litigated and determined in an application for a writ of prohibition or mandamus.

Finally, it is submitted that, as the federal judicial power extends to all cases of admiralty and maritime jurisdiction and is exclusive, it cannot be defeated or interfered with by any law of a state, whether statutory or common, or whether arising from or based upon any attribute of the sovereignty of said State.

Having fully answered in behalf of myself and the officers of said court, I respectfully submit that said rule should be dismissed and said writ denied, and that we be hence dismissed.

In Witness Whereof, I, John R. Hazel, Judge of the District Court of the United States for the Western District of New York, for and in behalf of myself and the officers of said court have hereunto set my hand and the seal of said court, this 2d day of December, 1920.

JOHN R. HAZEL,
U. S. District Judge.

(Seal of Court)

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CITATIONS

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No. 26, ORIGINAL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

IN THE MATTER OF THE PETITION OF THE STATE OF NEW YORK FOR A WRIT OF PROHIBITION OR MANDAMUS AGAINST THE HON. JOHN R. HAZEL, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK, IN A PROCEEDING IN A CASE OF ADMIRALTY AND MARITIME JURISDICTION PENDING IN SAID COURT, ENTITLED:

MARTIN J. McGAHAN AND MARGARET McGAHAN, AS ADMINISTRATORS OF THE GOODS, CHATTELS AND CREDITS OF EVELYN McGAHAN, DECEASED,

Libellants,

vs.

QUEEN CITY,

Defendant.

Memorandum in opposition in behalf of respondents Hon. John R. Hazel, Judge of the District Court for the Western District of New York, and the officers of said court.

Their objections to issuance of the writs are:

FIRST.

This application does not involve a question of jurisdiction, and, even if it does, the case is not one for interference by prohibition or mandamus.

The suit sought to be prohibited is in admiralty in the United States District Court for the Western District of New York. The sole parties at present are the libellants, Martin J. McGahan and Margaret McGahan, as Administrators, etc., and the defendant, the vessel, Queen City. The State is not as yet a party. As yet, also, the libel is purely in rem against the vessel. The owner is not sought to be named or identified, nor is any liability in personam alleged. It is alleged that the vessel while in maritime waters in said western district of New York committed a marine tort resulting in damages to libellants. That the vessel at the time of the commission of the tort and at the time of its seizure was within the jurisdiction of said District Court. All the jurisdictional facts necessary on the face of the libel are set forth in it.

The State has not appeared in the suit or made claim of ownership of the vessel or excepted or answered to the libel. After the suit was begun and the vessel seized it appeared ex parte, specially, and made suggestions of lack of jurisdiction on the ground that it owns the boat and that by reason of its sovereignty said District Court had no jurisdiction of the vessel. Said suggestions being overruled by the District Court, the order herein to show cause was issued by this Court on the ex parte application of said State.

The federal judicial power extends to all cases of admiralty and maritime jurisdiction and is exclusive. Art. 3, Sec. 2, Constitution; Sec. 24, sub 3, and Sec. 256, Judicial Code.)

The Moses Taylor, 4 Wall., 411.
The Hine v. Trevor, 4 Wall., 555.
American Steamboat Co. v. Chase, 16 Wall., 522, 529.

There can be no question but that originally the District Court had jurisdiction. That is under the facts set forth in the libel. It is not claimed otherwise, but only that something has been since extraneously suggested which ousts such jurisdiction—the ownership of the vessel, the *res* by the State. It is, therefore, not a question of jurisdiction, but whether, in such a situation, the powers of a court, originally having jurisdiction, and the jurisdiction itself, are destroyed, or still exist and should be continued over the subject matter to judgment.

The objections to such continuance now interposed by the State, we say, should properly be interposed according to the requirements of proceedings and practice in admiralty courts, that is, by appearing and claiming ownership of the vessel and excepting or answering to the libel, setting forth the grounds, viz.: that said vessel belongs to the State; that it was in the care and charge of the canal officers of the State, which canals are maintained and used by the State for commercial purposes, and which vessel is used by said officers of the State in the care and maintenance of said canals. Then a plea based on the sovereign attributes of the State could be heard, and, if overruled, appeal could be taken as a matter of right to the Circuit Court of Appeals and from there to this court. (The Steamship Jefferson, 215 U. S., 130; The Ira M. Hedges, 218 U. S., 264.)

In Illinois Central R. R. Co. v. Adams, 180 U. S., 28 (21 Sup. Ct. Rep., 251), it was claimed by a state that the proceeding was against it, although it was not named as a party, and could not be maintained against it because of its sovereignty, and this court held that such claim went to the merits and should be raised by demurrer or other pleading in the regular process of the case. (See State of South Carolina v. Wesley, 155 U. S., 542, 15 Sup. Ct. Rep., 230.)

This suit in its present form is purely in rem. A question may arise whether such a suit, when not in *personam*, can be maintained under the New York Death Statutes (Secs. 1902, 1903, 1904, 1905 New York Code Civil Procedure). This, however, is not a ground for prohibition (Ex parte Gordon, 104 U. S., 515) nor is any such ground urged here.

If, however, the owner of the vessel or any claimant shall appear and proceed by claim, and exception or answer, according to the usual practice in admiralty, libellants will be formally advised as to who the person, or corporation, or State is that may be liable in personam. Having become so informed libellants may procure the libel to be amended, making such person, corporation, or State, as well as the vessel a party, and will then have the advantage of a suit in personam as well as in rem to meet any objection to the suit raised by exception or defense, and have a chance to litigate it. For instance the master or captain sailing the vessel at the time or the superintendent of the canals having charge of the vessel and who authorized its use at the time, might either or both be personally liable. The State itself, if it owns the boat and was operating it as a master of servants in immediate charge of it, might be claimed to be privy to the negligence or wrong and liable in personam, at least in a suit in admiralty.

Section 47 of the Canal Law of the State of New York reads as follows:

> "There *shall be allowed and paid* to every person sustaining damages from the canals or from their use or management *or resulting or arising from the neglect or conduct of any officer of the State having charge thereof, or resulting or arising from any accident or other matter or thing connected with the canals*, the amount of such damages," etc.

Section 264 of the Code of Civil Procedure of said State provides generally for the liability in damages for a wrongful act, neglect, or default on the part of the State.

In short the question might arise as to whether the State has waived its immunity from liability to libellants, if that be necessary to recovery.

Another phase might arise. The State owns and operates the canals for commercial purposes. It has waived its immunity from liability for damages caused in such operation, to a large extent at least, by Section 47 of the State Canal Law. Has the State waived its immunity from liability to

libellants for the damages they have suffered as alleged? Is the State while operating a vessel on its canals for commercial purposes for pay, through officers and employees, engaged thereby in such governmental functions as will prevent a court of admiralty from exercising powers exclusively lodged in it?

All these questions may become important as under the Workman case (179 U. S., 552 (39 Sup. Ct. Rep., 460), where they were litigated in the regular and proper way on the merits and not by writ of prohibition.

All such questions, including the question of the jurisdiction of the court as challenged here can be properly examined and litigated only in the regular way according to the procedure and practice in admiralty, and the rulings of the court, reviewed if wanted, upon appeal and error. They cannot be properly examined and adjudicated upon in such an application as this.

It is well established that the writ of prohibition lies only where the District Court clearly had no jurisdiction of the case originally and where the relator has no other remedy.

In re Rice, 155 U. S., 396 (15 Sup. Ct., 149).

In re New York & Porto Rico Co., 155 U. S., 523 (15 Sup. Ct., 183).

It lies only to prevent an unlawful assumption of jurisdiction and not to correct mere errors and cannot be made to perform the office of a proceeding for the correction of such errors.

Ex parte Cooper, 143 U. S., 472 (12 Sup. Ct. Rep., 453, 457).

In re Detroit River Ferry Co., 104 U. S., 519.

It does not lie to perform the functions of a writ of error.

Commissioners of Patents v. Whiteley, 4 Wall., 522.

An error in judgment of an admiralty court cannot be corrected by prohibition but only by appeal.

Ex parte State of Pennsylvania, 109 U. S., 174 (3 Sup. Ct. Rep., 84).

Ex parte Gordon, 104 U. S., 515.

Ex parte Hager, 104 U. S., 520.

Re Fassett, 142 U. S., 479.

Re Engles, 146 U. S., 357.

Re Morrison, 147 U. S., 14.

It will not lie where the case is one in which the decision of the District Court *as to a question of jurisdiction* could be taken by appeal to the Circuit Court of Appeals and from there to the Supreme Court.

In re Huguley Mfg. Co., 184 U. S., 297 (22 Sup. Ct. Rep., 455).

Alexander v. Crollott, 199 U. S., 580 (26 Sup. Ct. Rep., 161),

Denial of the writ will not prejudice the State in so far as the above remedies are concerned.

Consolidated Rubber Tire Co. v. Ferguson, 183 Fed., 756.

It is obvious, we think, that the matters now urged as grounds for prohibition are matters of defense to the libel, and, also, relate only to questions as to the exercise of the *powers* of a court of admiralty, and any errors committed by the District Court in these behalfs, including the question of jurisdiction itself, may be corrected by appeal which lies as a matter of right in all cases in admiralty.

Where a District Court has jurisdiction the writ does not lie to restrain it from proceeding to exercise such jurisdiction (Morrison v. District Court for Southern District of New

York, 147 U. S., 14 (13 Sup. Ct. Rep., 246), but will issue only in case of want of jurisdiction either of the parties or the subject matter of the proceeding and cannot be used as a substitute for exception to a libel for insufficiency (ex parte Fassett, 142 U. S., 479 (12 Sup. Ct. Rep., 295).

It will not issue to restrain the court from proceeding in a libel case against a vessel for damages for drowning a person in a collision (in re Gordon, 104 U. S., 515; in re Detroit River Ferry Co., 104 U. S., 519).

It cannot be used to correct errors of a court in deciding matters of law or fact within its jurisdiction (Smith v. Whitney, 116 U. S., 167), and will be issued only on the record in the suit (ex parte Easton, 95 U. S., 68). The record of the suit shows jurisdiction perfect.

We say, therefore, that this is not a case for prohibition, but the grounds urged for the prohibition should be disposed of when raised in the regular and usual manner on the merits of the case (Scully v. Bird, 209 U. S., 481 (28 Sup. Ct. Rep., 597).

SECOND.

The objections here presented by the state founded on its sovereign attributes cannot, on the merits, or otherwise, prevail.

The body of admiralty law and the federal judicial power in admiralty and maritime jurisdiction are paramount and exclusive over and against everything except the sovereignty of the Federal Government itself, and foreign sovereignties having treaty rights. They recognize but one sovereignty in the United States, that of the Federal Government. Nor can there be but one sovereign power over the same thing at the same time. As to this body of law and these judicial powers, the States have surrendered both their sovereign powers and sovereign privileges under the constitution. The State can have or enact no law contravening or affecting them. Nor can

it urge its sovereign attributes to accomplish the same results. To hold otherwise would be a contradiction.

Workmen v. Mayor, 179 U. S., 552 (21 Sup. Ct. Rep., 212, and cases there cited).

U. S. v. Lake Monroe, 250 U. S., 246 (39 Sup. Ct. Rep., 460).

Knickerbocker Ice Co. v. Stewart, 40 Sup. Ct. Rep., 438).

Southern Pacific Co. v. Jensen, 244 U. S., 205 (37 Sup. Ct. Rep., 525).

Union Fish Co. v. Erickson, 248 U. S., 308.

It is immaterial to whom the vessel proceeded against in admiralty belongs.

Clark v. New Jersey Steam Navigation Co. (C. C. 1841), Fed Cas. No. 2859.

The John G. Stevens, 170 U. S., 113 (18 Sup. Ct. Rep., 544).

The Siren, 7 Wall., 152.

The question as to the limits of maritime law and admiralty jurisdiction is exclusively a judicial question.

The Lottawanna (Rodd v. Heartt), 21 Wall., 558.

Ex parte Easton, 95 U. S., 68.

The jurisdiction depends not on the character of the parties but on the subject matter.

The Jerusalem (C. C. 1814), Fed. Cas. No. 7293.

De Lovic v. Bait (C. C. 1915), Fed. Cas. No. 3776.

Clark v. New Jersey Steam Navigation Co., Fed. Cas. No 2859.

The use of the words "admiralty" and "maritime" in the constitution relates simply to subject matter and embraces all

cases arising under the general maritime law (Waring v. Clark, 46 U. S. (5 How.), 441, 473).

The States having under the constitution surrendered to the Federal Government their sovereign powers and privileges as to admiralty law and admiralty and maritime jurisdiction, which latter rests exclusively in the federal judicial power, cannot abrogate or limit admiralty law, or defeat or interfere with the exercise and enforcement of such federal judicial power by any law of their own, or by any objection and defense founded on or arising from their sovereignty.

The vessel in question being, and having committed the marine tort, in maritime waters was under the exclusive sovereignty of the United States and within the exclusive Federal judicial power. The State cannot, by reason of its sovereignty as to other matters and things, oust or limit either the Federal sovereignty or the jurisdiction and powers of the Federal courts over the res, the vessel.

IRVING W. COLE,
THOMAS P. HALEY,
Proctors for Hon. John R. Hazel,
Judge U. S. District Court for
Western District of New York.

Office and P. O. Address,
707 D. S. Morgan Bldg.,
Buffalo, N. Y.